Supreme Court, U.S.
FILED

No. 061323

MAR 30 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IN RE:

DAN C. SIMONS (INDIVIDUALLY AND AS TRUSTEE OF THE DAN C. SIMONS EQUITY TRUST) AND SALLY J. SIMONS (INDIVIDUALLY AND AS TRUSTEE OF THE DAN C. SIMONS EQUITY TRUST), PETITIONERS

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF MANDAMUS AND OTHER SPECIAL WRITS

SUSAN ROSE
9553 S. Indian Ridge Drive
Sandy, UT 84092
(801)545-0441

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

QUESTION 1: Did all the lower Courts , exceed their subject matter jurisdiction, and personal jurisdiction when they (1) disregarded, annulled, modified, the original 1983 inseparable 1972, 1973 and 1974 agreement memorialized in two Tax Court decisions, and upheld by the Tenth Circuit Court, (2) encouraged and upheld a statutorily - barred *second* 'final' closing agreement (28 U.S.C §7121) in 2002, (3) ignored the 12-year-U.S.- withheld proof the United States had no legally cognizable injury in a U.S. initiated 1992 reduce a 7-25-83 assessment action for year 1974, (4) determined U.S. violations of statutes for taxes, are not jurisdictional, but mere defenses to be waived, (5) instead of *sua sponte* declaring their jurisdiction was *void ab initio* and transferring the Petitioner's Breach of Contract claims and other directly related claims to the Court of Federal Claims?

QUESTION 2: Did the U. S. Court of Federal Claims, exceed its jurisdiction when it split 'tax assessment' issues and breach of contract inseparable issues into to two separate Circuits and lines of lower courts, one for tax and one for contract?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

LINKED APPEALS 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

Eight Simple Undisputable Facts 4

DIAGRAM OF WHAT OCCURRED AND WHAT SHOULD HAVE OCCURRED FOR 1974 AND WHAT DID OCCUR 5

ISSUES 10

ARGUMENT 10

WHY IMMEDIATE RELIEF IS NOT AVAILABLE IN ANY OTHER COURT 10

WHY THIS PETITION SHOULD BE GRANTED 12

Right to Relief Sought 15

All Lower Courts Exceed Their authority 16

NATURE OF THE WRITS RELIEF..... 21

CONCLUSION..... 22

APPENDIX

FEDERAL CIR. CASE NO. 2007-1126

2/1/2007 Federal Circuit Court *sua sponte* transfer Order to the 10th Cir claiming case was a 'tax assessment' case, ignoring breach of the 1983 Tax Court contract issued as an order of mandate 3/20/07.....1a

2/27/ 2007 Federal Circuit denial of reconsideration.....3a

3/20/2007 Federal Circuit *sua sponte* re-issuance of 2/1/07 Transfer order, "issued as a mandate".....67-68a

COURT OF FEDERAL CLAIMS CASE NO. 06-115

2/21/2007 Court of Federal Claims, Denial Of Reconsideration and Other Motions.....4a

11/30/2006 Court of Federal Claims Dismissal of Breach of Contract, Takings and other directly associated Claims 16a

DISTRICT COURT CASE NO. 92 CV 1071

6/20/2002 U.S. District Court (Utah central), order declaring a handwritten offer a contact 32a

HANDWRITTEN OFFER.....34a

8/5/2002 District Court final Judgment 35a

12/11/2006 District Court refusal to declare jurisdiction Void and transfer the breach of contract, etc. claims To the Court of Federal Claims- simply rubber stamping The U.S. *res judicata* position brief.....37a

TENTH CIRCUIT COURT CASE NOS. 98-9012-9013
7/12/1999 Tenth Circuit Upholds as binding final
Agreement Two 1983 Tax Court decisions.....38a

TENTH CIRCUIT COURT CASE NO. 02-4201
1/22/2004 Tenth Circuit Court upholds August 5, 2002
District Court final Judgment ignoring 1983 Tax Court
Binding final closing agreement 44a

CPA CERTIFIED CALCULATION showing how
1983 agreement for tax years 1972, 1973, and 1974 was
Fully paid with the one time collected and paid
$49,546.55 to within .07 cents or .001 error of what
Actually paid.....50a

TAX COURT CASE NO. 80- 13016
1983 Stipulated Decision For years 1972 and 1973 .....52a
Does not say what specific 'statutory' interest will apply

TAX COURT CASE NO. NO. 79-10312
1983 Stipulated Decision for year 1974.....53a
Does not say what specific 'statutory' interest will apply

1983 TAX COURT STIPULATED RULE 155
IRS-DRAFTED COMPUTATIONS
That income average, making all three years
Inseparable by year, mathematically and legally.....54-56a
IRS drafted form does not specify which 'statutory'
Interest will apply.....54a

IRS INTERNAL QUICK ASSESSMENT REQUEST FORM
6/23/83 Shows the 7-25-83 (23c) 'assessment' for 1974 is
after The IRS manager identified 7-19-83 Assessment
Statute Expiration Date..... 57a

1/11/1982 Letter of Offer of a 'package' settlement For all three years 1972, 1973 and 1974, inseparable By year, no mention of specific interest.....59a

1/26/1983 District Counsel's Decision, appeals office approved, accepting that all Three years will "be treated together for purposes of Settlement. Two Settlement documents will, however, be prepared for filing with the Court." Does not mention any specific 'statutory' Interest. .....60a-63a.

Expert Opinion of CPA Bryan Bolander, President of Utah Association of CPA's, showing full payment of 1974..... 64a-67a

1992 U.S. Dist. Crt. complaint seeking to reduce to judgment a 7-25-83 and subsequent assessments w/o telling the District Court the 7-25-83 Assessment was statutorily late, also claims timely notice and demand were made, without saying to the Court that no timely notice and demand had issued for either Tax Court decision.....66a

TABLE OF AUTHORITIES

Page

CASES

ALASKA PACKERS ASSN. V. DOMENICO, 117 F. 99 (9TH CIR. 1902) 5,14, 19, 23

ALEXANDER V. UNITED STATES, 44 F.3D 328, 332 (5TH CIR. 1995)..... 15

AMERICAN FIRE & CASUALTY CO. V. FINN, 341 U.S. 6 (1951)..... 16

ANTHONY V. UNITED STATES,987 F.2D 670(10TH CIR.1993)..... PASSIM

BOLING V. UNITED STATES, 220 F.3d 1365, 1373 (Fed. Cir. 2000).....29

BOTANY WORSTED MILLS V. UNITED STATES, 278 U.S. 282, 289(1929).....11,17,28

BULL V. U.S., 295 U.S. 247 (1935) 18, 20

CAPRON V. VAN NOORDEN, 2 CRANCH 126, 127 (1804) 17

CITY OF CINCINNATI V. UNITED STATES, 153 F.3D 1375, 1377 (FED. CIR. 1998).....26,27

CHRISTOPHER VILLAGE, L.P. V. UNITED STATES, 360 F. 3D 1325 (FED. CIR. 2004)..... PASSIM

COMMISSIONER V. LUNDY, 516 U.S. 235 (1996).....17,19

CRNKOVICH V. UNITED STATES, 202 F.3D 1325..... PASSIM

CTA INCORPORATED, v. UNITED STATES, 44 FED. CL. 684, 698 (1999).....29

CW GOV'T TRAVEL, INC. v.UNITED STATES,46 Fed. Cl. 554, 557-58 (2000).....29

DUBUC v. JOHNSON, 314 F.3D 1205, 1209 (10TH CIR. 2003).....20

EDWARDS v. UNITED STATES, 19 Cl. Ct. 663, 669 (1990)....29

FAFEL v. DIPAOLA, 399 F.3D 403, 410 (1ST CIR. 2005).....16

FREYTAG v. COMMISSIONER, 1991 U.S. LEXIS 3818,*49-50 ;501 U.S. 868.....16

GLASS v. UNITED STATES, 258 F.3d 1349, 1355-56 (Fed. Cir.2001).....29

GRANNIS v. ORDEAN, 234 U.S. 385, 394 (1914).....16

HATTER v. UNITED STATES, 203 F.3d 795, 797-98 (Fed. Cir. 2000)..... 30

HURT v. UNITED STATES, 70 F.3D 1261 (4TH CIR.1995)..... .....PASSIM

IN RE PACIFIC RY. COMM., 32 FED 241(C.C.N.D. CAL. 1887).....4

IRWIN v. DEPARTMENT OF VETERAN'S AFFAIRS 498 U.S. 89,96 (1990).....29

JERSEY SHORE BANK v. UNITED STATES, 107 S. Ct. 782, 785 (1987).....18

KALB v. FEUERSTEIN, 308 U.S. 433 (1940).....15

KERR V. U.S. DISTRICT COURT, 426 U.S. 394, 402-403 (1976) 12

KOKKONEN V. GUARDIAN LIFE INS., 511 U.S. 375 (1994) 16

KONTRICK V. RYAN, 540 U.S. 443 (2004) 12

KURIO V. U. S., 429 F. SUPP. 42 (S. D. TEXAS (1970) ..... PASSIM

LORD V. VEAZIE, 49 U.S. (8 HOW.) 251, 254, 255(1850) 17

LUJAN V. DEFENDERS OF WILDLIFE, 504 U.S. 555, 560-61(1992) 18

MALLARD V. U.S. DISTRICT COURT, 490 U.S. 296, 308-309 (1989) 12

MANSFIELD, C. & L. M. R. CO. V. SWAN, 111 U.S. 379, 382 (1884) 16

MARBURY V. MADISON, 5 U.S. 137, 2 L. ED. 60, 1 CRANCH 137 (1803) 15

MITCHELL V. UNITED STATES, 10 Cl. Ct. 63, 75, as modified, 10 Cl. Ct. 787 (1986) 30

GRANNIS V. ORDEAN, 234 U.S. 385, 394 (1914) 16

PENN. BUREAU OF CORRECTION V. U.S. MARSHALS SERVICE,474 U.S. 34, 43 (1985) 2

POWELL V. ALABAMA, 287 U.S. 45, 68-69 (1932) 14, 16

PUGH V. COMMISSIONER, 213 F.3d 1324

(11th Cir. 2000).....28

RINK V. COMMISSIONER, 47 F.3D 168, 171 (6TH CIR. 1995).....15

ROCHE V. EVAPORATED MILK ASSN, 319 U.S. 21(1943).....14

SACCO V. DEP'T OF JUSTICE, 317 F.3D 1384, 1386 (FED. CIR. 2003).....20

SCHLESINGER V. RESERVISTS COM. TO STOP THE WAR, 418 U.S. 208, 225-226 (1974).....19

SINGLETON V. U.S., 128 F.3d 833 (4th Cir. 1997.....25

TEXACO, INC. V. CHANDLER, 354 F.2D 655(1965)..... 16

U.S. ALKALI EXPORT ASSN. V. UNITED STATES, 325 U.S. 196 (1945).....13

UNITED STATES V. BERMAN, 825 F.2d 1053 (6th Cir. 1987)..25

UNITED STATES V. GURLEY, 415 F.2D 144 (5TH CIR. 1969).....12

UNITED STATES V. MAYER, 235 U.S. 55, 68 (1914).....13

UNITED STATES V. MCGEE, 933 F.2D 184, 187(9TH CIR. 1993).....12

UNITED STATES V. MORGAN, 345 U.S. 502, 507-08, 512 (1954).....13

WOOD V. UNITED STATES, 961 F.2D 195, 198 (FED. CIR. 1992).....29

STATUTES

26 U.S.C. §6501 2

26 U.S.C §7121 10

28 U.S.C. §171 28

28 U.S.C §450A 4, 16

28 U.S.C §455(A) 12

28 U.S.C. §§1292, 1295 6

28 U.S.C §1340 17

28 U.S.C. 1651(A) 14

28 U.S.C. §1651 1

28 U.S.C §§1346 ..... 6, 11, 19

28 U.S.C §1345 17

28 U.S.C. §2519 28

I.R.C. §§61, 108 28

I.R.C. §6212 25

I.R.C. §6213 25

I.R.C. §6215 25

I.R.C. §6303 25

I.R.C. §6321 25

I.R.C. §6501.....3, 5, 6,25

I.R.C. §6503.....25

I.R.C. §7121 ..... PASSIM

I.R.C. §7491 .....22, 23

I.R.C. 7402 17

IRC §6303 18

RULES

FRCP 60.....1, 3

FRCP RULE 60.....3

FED. RULE CIV. PROC. 12(H)(3).....17

OTHER SOURCES

IRM 8.7/1.1.2 AND 35.10.7 25

RESTATEMENT (SECOND) OF JUDGMENTS §12(2).....19, 29

R. Stern, E. Gressman, S. Shapiro, &
K. Geller, SUPREME COURT PRACTICE
581 (8th Ed. 2000).....13

April, 1997 U. S. Treasury Report to Congress
"NETTING OF INTEREST ON TAX OVERPAYMENTS
AND UNDERPAYMENTS" pg. 8.....24

OPINIONS BELOW [1]

(1) 1983, U.S. Tax Court **("TC")** No. 79-10312 & Tax Ct. No. 80-13016 for three years, inseparable, **1972, 1973**, and **1974**, (P. Ap. 52a, 53a); **(2)** 1999, Simons v. C.I.R.,[2] 10th Cir. docket no. Nos. 98-9012 & 98-9013 issued 7/12/1999, **("Simons 1999")** (P. Ap. 38a); **(3)** U. S. District Court, **("DC")** Utah, Central Division, U.S. v. Simons, 92 cv 1071, June 20, 2002 order (P. Ap. 32a), Aug. 5, 2002 judgment, (P. Ap. 35a); **(4)** U.S. v. Simons, Tenth Cir. 02-4201, Jan. 22, 2004 (P. Ap. 44a) **("Simons 2004")**. **(5)** The DC judgment of Dec. 11, 2006. (P. Ap. 37a); **(6)** Court of Federal Claims, **("CFC")** case no. 06-115, Nov. 30, 2006 (P. Ap. 16a) and February 27, 2007 (P. Ap. 41a) final judgment; **(7)** Federal Circuit Court of Appeals **("FCC")**: case no. 2007-1126 (appeal of DC Dec. 11, 2006 refusal to transfer Breach of Contract ("BOC") claims) transfers case to 10th Circuit Court Feb. 27, 2007 (P. Ap. 1a-3a), as a 'tax assessment' case. The CFC dismissal of BOC claims is docketed as a 'stand alone' case in the FCC case no. 2007-5078, *inseparable* in issues from 2007-1126 transferred to 10th Cir.

LINKED APPEALS

Federal Circuit Court (FCC) Case no. 2007-5078 – *BOC claims* dismissal from CFC 06-115. **Case no. 2007-1126** – Appeal of the refusal of the District Court (case no. 92cv1071) to grant FRCP 60 relief and vacate its decision as void and transfer the case to the claims court. (P. Ap 37a). This case is now transferred to the **10th Circuit Court** (P. Ap. 1-3a) FCC case no. 2007-1126.

JURISDICTION

This Court has jurisdiction ("juris.") by 28 U.S.C. §1651 (a), the All Writs Act, and U.S. Constitution Article III. *Penn.*

*Bureau of Correction v. U.S. Marshals Service,*474 U.S. 34, 43 (1985).

RELEVANT PROVISIONS INVOLVED

26 U.S.C. ('I.R.C.') §7121. Closing agreements

(b) Finality - .....such agreement shall be final and conclusive, and, ...

(1) the case ***shall not*** be reopened ...or the agreement modified by **any** officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, ***assessment***, collection, payment, abatement, refund, or credit made in accordance therewith, ***shall not*** be ***annulled, modified, set aside, or disregarded***. (emphasis added)

26 U.S.C. §6501

"(a) General rule ....the amount of any tax imposed by this title ***shall*** be assessed within 3 years after the return was filed...before the expiration of 3 years after the date on which any part of such tax was paid, and *no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.."* (emphasis added)

STATEMENT

There is no case like this case in *all* the annuls of Tax Law after years of extensive research. It involves a quarter of a century of a labyrinth of tax law and numerous facts, hence many footnotes. It is hoped this Court, unlike those below, will rely on proof and law, not innuendo and name calling [3], primarily originating in the DC when TPs did not wish to 'settle,' once they had *12* year- U.S.-withheld unchallenged proof the U.S. had no U.S. Constitution Article III injury, no standing, no case or controversy [4] at the time of filing a 1992 reduce a 7-25-1983 assmt to judgment action. (P. Ap.

66a). In 1983 the TPs entered into a package *inseparable* agreement for tax years 1972, 1973 and 1974, memorialized in two IRS-drafted *stipulated* TC decisions, (P. Ap. 52-53a) with identical IRS-drafted stipulated income averaging TC rule 155 computations (P. Ap. 53a-56a), that income averaged all three years, making them inseparable, mathematically and legally. P. Ap. 64-65a. After full payment in 1983[5], posting to accommodate a IRS computer incapable of posting restricted statutory interest properly, endnote 5, there was 5 years of silence. In 1988, the U.S. split off an IMF 'closed' (LC Ap 62a) 1974, claiming it had not been paid, issued levies and liens (LC Ap 85-95). The U.S. filed a 1992 action (P. Ap. 66a) in DC, case 92cv1071, to reduce a 7-25-83 assessment ("assmt") [undisputedly I.R.C. §6501 *late*] to judgment for 1974, resulting in a 2002 DC declared 'handwritten offer' second final 'agreement', ("2002 K")that was invalid and not binding, due to (1) no actual consent of the parties, (2) mistake or fraud, (3) lack of federal juris. Simons, 2004, P. Ap. 46a. Also, the 2002 K meets not one criteria for a U.S. binding contract. Endnote 12.

December 11, 2006, the DC refused to vacate its void jurisdiction and transfer the TPs BOC case to the CFC. P. Ap. 37a. February 15, 2006, the TPs had already filed a BOC case in the CFC, but later filed a FRCP rule 60 motion in DC, upon the advise of the DOJ to the CFC that it had no authority to declare a Article III Court's judgment void. The CFC has dismissed this action (P. Ap. 16a) now on appeal FCC 2007-5078. The FCC transferred the appeal of the DC Dec. 11, 2006 refusal's appeal, over to the 10th Cir, even after knowing of the CFC action on the same case, claiming the case was a 'tax assessment' matter. P. Ap. 1a-3a. FCC case no. 2007-1126. Both have the same facts, issues, parties originating in the 1983 TC acts. All Courts ignore the TPs undisputable proof of full payment of 1974, (endnote 5), and a pattern of statute violations [6], barring future collections, that is highly unlikely to be accidental, but was likely to

protect TPs from future collections – if they had their records accessible to them.

SUMMARY OF THE ARGUMENT

Eight Simple Undisputable Facts

(1) Since the 1983 K and $49,46.55 payment, *not one scintilla* of credible proof has shown these TPs ever owed more for 1974. **(2)** The IRS keeps two sets of books- an (IMF) individual master file (computer), and *non masterfile.* (LC Ap. 120). **(3)** The U.S. withheld TPs' key *non* masterfile (IMF computer) documents [7] for 12 years, judicially (LC Ap 125, 123,127, 64); administratively (LC App 118); and in over about dozens of Freedom of Information Act and Privacy Act requests ("FOIA") (LC Ap. 164-179). **(4)** Not one Court has made any factual findings that the TPs owe more after their $49,546.55 1983 payment for a 1983 contract. **(5)** The U.S. in 1992 sought to reduce to judgment a 7-25-83 assmt for 1974, past the IRS -identified '7-19-83' assmt expiration date ("ASED") I.R.C.§ 6501, (P. Ap. 57a), due to a form 872 (LC Ap. 57-59) date certain, making the DC and 10th Circuit's juris. *void ab initio* (Christopher Village, Crhnkovich, *infra,* U.S. v. Simons, *2004 P. Ap.44a*); **(6)** The TPs' proof of lack of DC juris. was unchallenged, Courts' *sua sponte* wholly or selectively ignore it, (28 U.S.C §450a); **(7)** All the post -1983 collection actions for 1974, were an impermissible 'fishing expedition', In re Pacific Ry. Comm., 32 Fed 241(C.C.N.D. Cal. 1887) (*'A general, roving, offensive, inquisitorial, compulsory investigation, ...upon no fixed principles, ...governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws... "*); **(8)** All Rev. Off. ('RO") Thurman need do in 1988, and Justice Dept (DOJ) in 1992, to avoid the millions lost in Court and parties' resources, was release ALL the TPs' *non-* master file documents, that RO Thurman writes he had and

copied (LCAp 68, 64, 125, 123), and DOJ attorney Lusty wrote of in 1996 (LC Ap 64). [8] **Such a small kind act could have saved these TPs years of *underserved* very serious harm, and 10 years of Court resources.**

At this point, the entire 1983 agreement under seal, and the 10th Cir. opinion in Simons, 1999, once the TPs can show without doubt what it was, why it was paid, are extinguished and whole new ground is being plowed for the first time in tax law history that this counsel can find. All the lower courts are upholding the DC, second 'final' 'agreement', with all violating I.R.C. §7121, and logic of Alaska Packing, *infra,* and all prior binding precedents.

DIAGRAM OF WHAT SHOULD HAVE OCCURRED FOR 1974 AND WHAT HAS OCCURED

1983 agreement memorialized in two TC decisions make '72,'73', 74 '*inseparable* by income averaging in stipulated TC rule 155 computations- with $49,546.55 payment. IRS closes '72, and '74, puts all 3 yr. payment into 1973. All are closed.P. Ap 62-63a

WHAT SHOULD OCCUR

If fully paid, ***no*** valid assmt
no written notice and demand

2/15/2006, TPs file BOC & taking claims in CFC by 28 U.S.C 1491, 1346, U.S. Const. 5th Amendment. Dismissed 11/30/ 2006.

CFC BOC dismissal appeal is in FCC. 2007-5078. If DC refuses to transfer BOC to CFC, then appeal is heard in FCC. 2007-1126. 28 U.S.C §1295(a)(2),(3), 28 U.S.C §1292(d)(4)(b)

If TC decision is ***not*** fully paid *after* timely valid assmt.
I.R.C. §6501 And §6303 written notice and demand

1988, IRS splits off 1974 & in 1992 DOJ files DC action to reduce7-25-83 [late] assmt. to judgment.

If proof -withheld for 12 years- shows no valid assmt. or written notice and demand and full payment, there is no U.S. case or controversy. All is *void ab initio. Crnkovich, Christopher Village, infra,* BOC claims transferred to CFC.

If 10th Cir. hears appeal and sees proof of no timely assmt. , no standing, then it voids juris. and transfers BOC claims to FCC to assign to the CFC. Id. ----***except here*** it relies on 9th and 5th Circuit law to say I.R.C. §6501, 6303, etc. statute of limitations is a mere defense, not juris.al bar, that can be waived, by a consent decree, P. Ap. 48a, (no actual 'consent.)

WHAT OCCURRED HERE

1988, IRS splits off 1974 from 1983 *inseparable* agreement (P. Ap. 59a-60a), in 1992 DOJ files DC action to reduce7-25-83 [late] assmt. to judgment (LC Ap 183) stating timely notice and demand was given. [untrue].

CFC ← X

(1) 3/21/01,DC faced with 2000 FOIA-released proof of no valid 7-25-83 assmt, etc.- and full payment, *sua sponte* disallows TPs to add to record; ignores TP's unchallenged proof; disregards, the 1983 K & 'suggests' a 2nd settlement [violating I.R.C. §7121); gives accolades to DOJ attorney who withheld the proof; has an *exparte* report from same DOJ attorney; the DOJ attorney signing 'offer' has no authority; 'Offer' allows parties to opt out. P. Ap. 34a

(2) A 3/21/2001 'WORLDWIDE' **offer** is made for ALL persons, ALL claims (LC App. 205) under duress of DC *sua sponte* ignoring TPs' claims and proof. **P.Ap 34a**

(3)U.S. 5/25/2001 rewrites the offer w/out 'WORLDWIDE', saving U.S. & parties' future claims .'**counteroffer**' ends

(4) TPs reject the counteroffer, TPs opt for hearing, as allowed, in 'offer', LC Ap 227. P. Ap. 34a, 45a

(5) June 18, 2001 DC states ***settlement "did not happen***" (LC Ap 227) "they want to work backwards to 1973 and '74 and 1983, and the Court is not having any of it."(LC Ap 230) disregards 1983 K & §7121. **June 20, 2001** DC, *sans* U.S. 'rewrite', says 'offer' (P App.34a) a binding 'K'; TPs refusal to pay "not in good faith"; **'no dispute ...each party... agreed to settlement agreement"**; '*orders*' payment. LCC App 203. **P. Ap. 32a. TPs pays $55.000**

After payment, DC issues judgment Aug. 5, 2002, (P. Ap. 35a) extinguishing only U.S. claims, also future claims. (LC App 215) (P. App. 35a) a 'worldwide' end? NO… The U.S. objects to this 'consent decree' ---allegedly based on U.S.-TP 'agreement' (LC App. 206-206a) that '**did not happen**' and *rebills these TPs* (LC Ap 139b)- Proving "lack of actual consent, fraud in obtaining consent, lack of federal juris., or mistake…," U.S. v. Simons, Tenth Cir. 02-4201, Jan. 22, 2004---making the Aug. 5, 2002 DC judgment non binding on all other courts. The U.S. was preserving future claims. A form 843 was filed for ALL refunds, damages, etc. No full refund, damages by IRS.

(6) In DC, U.S. tries to preserve Agency statute powers for future claims, by objecting to final judgment (LC Ap 206-206a).

(8) Feb. 15, 2006, CFC Tucker Act,Takings, Torts (directly related), fraud and mistake, complaint is filed as per RCFC 9, claiming DC juris. was *void ab initio*, *Christopher Village, Crnkovich.* Nov.30, 2002 CFC dismisses U.S.ing *res judicata* for the DC Aug. 5, 2002 'consent' decree- *selectively* ignores, almost all the proof of the 1983 full payment for 1974, and void DC 2002 juris.d. No breach of a 2002 contract claim can amend dismissed complaint. 2002 K meets no contract criteria. Appealed **FCC case no. 2007-5078** dktd. 3/6/2007.

(9) Later a FRCP 60 motion to vacate & transfer is filed in DC, upon DOJ claim it is the proper court, not CFC. DC denies. **FCC Appeal 2006-1126 P. Ap. 1a-3a**

(7) On appeal, *U.S. v. Simons*, Jan. 22, 2004, case no. 02-4201, the 10th Circuit Court does not sua sponte vacate, eliminates the U.S.' standing requirement,(*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)) **with proviso the DC judgment is not binding if no actual consent, mistake or fraud, lack of fed juris.— that all courts are ignoring.** P. Ap. 46a.

(9) Feb. 1, 2007, *sua sponte*, the FCC transfers case no. **2007-1126** (DC denial of motion to vacate and transfer case to CFC) back to the 10th Circuit characterizing the case as a 'tax assmt. ' case saying the court has no juris. over tax assmts, *contra* Christopher Village and Crnkovich *infra*. P.Ap 1a-3a. A timely filed motion for reconsideration showing contract claims with evidence referenced herein, is denied Feb. 21, 2007, prior to CFC appeal. FCC was informed of CFC claims case dismissal, appeal FCC **2007-5078**.

The case is now split into two Circuits with no rules on handling transfers

FCC has BOC claims 2007-5078

Tax assmt issues and BOC issues inseparable

10th cir has tax assmt. part FCC 2007-1126

UNCHALLENGEABLE PROOF OF INVALID ASSESSMENT AND DC VOID JDGMT. 1) A IRS 'quick or prompt' assessment request form -manager supervised shows 7-25-83 assessment ("23c date"), shows the Assessment statute expiration date 'ASED', as 7-19-83.LC Ap. 5, **P. Ap. 57a. 2)** A form 872 ASED extension calculates a ASED date certain as 6-24-83, a month earlier. LC Ap. 58. *Both withheld until about 2/15/2000.* **3)** 3/1/2002 U.S. Treasury ***admits*** only 1975 assmt. (fully paid) would generate a balance due notice, i.e. w/in the statutes, timely, valid. (LC. Ap. 100, 109-110).No valid assmt = no U.S. legal injury= void DC, 10th cir.

See, endnote [9]

REASONS FOR GRANTING THE PETITION

ISSUE 1: The lower Courts , exceeded their subject matter jurisdiction, and personal jurisdiction when they (1) disregarded, annulled, modified, the original 1983 inseparable 1972, 1973 and 1974 agreement memorialized in two Tax Court decisions, and upheld by the Tenth Circuit Court, (2) encouraged and upheld a statutorily - barred *second* 'final' closing agreement (28 U.S.C §7121) in 2002, (3) ignored the 12-year-U.S.-withheld proof the United States had no legally cognizable injury in a U.S. initiated 1992 reduce a 7-25-83 assessment action for year 1974, (4) determined U.S. violations of statutes for taxes, are not jurisdictional, but mere defenses to be waived, (5) instead of *sua sponte* declaring their jurisdiction was *void ab initio* and transferring the Petitioner's Breach of Contract claims anddirectly related claims to the Court of Federal Claims.

ISSUE 2: The U. S. Court of Federal Claims, exceeded jurisdiction when it split inseparable 'tax assessment' and breach of contract issues into two separate Circuits and lines of lower courts, one for tax and one for contract.

ARGUMENT

1. WHY IMMEDIATE RELIEF, AND ALL OTHER RELIEF, IS NOT AVAILABLE IN ANY OTHER COURT

There are two 'final' *closing* settlement 'contracts' for the year 1974 (I.R.C. §7121 only allows one): **(1)** a 1983 final closing contract filed in two U.S. TC decisions (P. Ap. 52a, 53a) (Simons 1999 P. Ap. 38a) meets all the criteria for a legitimate U.S. binding contract **[[10]] final for all claims[[11]]**; **(2)** a 2002 DC 'consent decree' (P. Ap. 35a) based on a *June 20, 2002* order declaring an 'agreement' (P. Ap. 32a) of a

U.S. 'acceptance' [12] of a handwritten offer (P. Ap. 34a) for a 'settlement' the **DC observed in a June 18, 2002 hearing, "did not happen"** (LC Ap 227), then declares on June 20, 2002 in a written order, there was 'no dispute' about the agreement. (P. Ap. 32a). The TPs assert the 'handwritten offer' contract (a) does not meet one single criteria for a binding U.S. contract, [13] (b) was not 'final' and leaves them possibly potentially open to U.S. future claims, possibly on a ' forgiven debt'[14], non existent after full $49,546.55 payment of the 1983 K in 1983, (c) that may possibly cost them millions, with penalties and interest, (d) **the U.S. does not deny**. The U.S. may have reserved rights to these 'future claims' by objecting to the final judgment, if DC juris. is valid (LC Ap. 206). Botany Worsted Mills v. United States, 278 U.S. 282, 289(1929). [15]

Split 1: TPs seek Tucker Act (28 U.S.C 1346 and 1491 relief for the U.S. breach of the 1983 contract ("1983 K") that led to the U.S. 1992 DC action (LC Ap 184), and DC 2002 'contract' ("2002 K") (P. Ap. 34a) and August 5, 2002 DC 'consent decree' (P. Ap. 35a). The same parties, same issues, same time frames, same Court rulings ***are now split by the FCC into two lines of Circuits***, one for tax assessment ("assmt") [16] (TC, DC, 10TH Cir.) (U.S. v. Simons, 2004 P. Ap. 44a) and void 2002 K claims case no. 2007-1126, and one for ("BOC") claims, damages exceeding $10,000 (TC, CFC, FCC), 2007-5078. (Simons v. C.I.R. 1999 P. Ap 38a). The CFC, FCC, and DC are denying Tucker Act relief on the 1983 K by giving *res judicata* to the August 5, 2002 judgment. [17] The issue of the U.S. violating virtually every known statutory prerequisite to further collections going to DC subject matter and personal juris., Christopher Village, Chrnkovitch, *infra*, *are inseparable* from BOC claims, when those BOC claims can not be heard due to *res judicata* and claims preclusion for void DC orders and judgments.

Split 2: The Tenth Circuit holds that if the U.S. violates IRS statutes of limitation, they are just like any other defense, that can be waived by 'consent', (Simons 2004. P.

Ap. 48a), not jurisdictional, citing United States v. McGee, 933 F.2d 184, 187(9th Cir. 1993) and United States v. Gurley, 415 F.2d 144, 147(5th Cir. 169)(unlike here, the ASED was either unknown or a violation was unproven, neither addressing a prior FINAL TC agreement, ending any further claims, and here, the 'offer' was not an extension of the statutes for the U.S.). Cf. Kontrick v. Ryan, 540 U.S. 443 (2004); Crnkovich v. United States, 202 F.3d 1325 (Fed. Cir. 02/01/2000); Christopher Village L.P. v. United States, 360 F.3d 1319 (Fed. Cir.2004). Cf. I.R.C. §7121. P. Ap. 48a.

Also, there can be no relief in any other Courts, as NO other Courts have given any *res judicata* and claim preclusion protection to the TPs under the 1983 K, or to Simons v. CIR, 1999, P. Ap. 38a. They all give *res judicata* and claim preclusion to the 2002 'consent decree' that was not binding, Simons 2004, P. Ap. 44a, and selectively or wholly ignore the proof that the 2002 'consent decree' was outside federal jurisdiction, lacked actual consent, under the duress of a DC angry at the length of the litigation (LC Ap. 220) [due to 12 year withheld evidence], who gave accolades to the DOJ attorney who withheld the evidence (LC Ap 220), and who ignored TPs proof and claims, leaving them no viable choice but to make an 'offer'. (LC Ap 219). See, 28 U.S.C §455(a) requirements. Inability now to achieve redress in any other Court, demonstrates duress.

2. WHY THIS PETITION FOR MANDAMUS SHOULD BE ACCEPTED

A special writ is an extraordinary remedy appropriate only (1) if TPs show they have a right to the relief sought, (2) a lower court has clearly abused its discretion or exceeded its authority; (3) the petitioner has no other means of relief... (*see, supra*, WHY RELIEF IS UNAVAILABLE IN ANY OTHER COURTS.) See, e.g., Mallard v. U.S. District Court, 490 U.S. 296, 308-309 (1989); Kerr v. U.S. District Court, 426 U.S. 394, 402-403 (1976). TP's readily acknowledge the

All Writs Act can not be used as a substitute for Appeal. H. R. Rep. No. 308, 80th Cong., 1st Sess., A145 (1947) U.S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945). It was however designed to fill the gaps when the need arose to clarify and enforce jurisdictional issues or when there was a denial of due process occurring. Mallard, Kerr, Roche, *supra.* The Court's authority has uniformly held a writ of Corum Nobis error is available under the All Writs Act to rectify "errors of the most fundamental character." [which jurisdictional errors would comport]. United States v. Morgan, 345 U.S. 502, 507-08, 512 (1954); United States v. Mayer, 235 U.S. 55, 68 (1914). A writ of contract or mandamus to enforce contracts and grant relief is perhaps not used often, but is not expressly forbidden. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 591 (8th ed. 2002) (writs of certiorari, habeas corpus, mandamus, and prohibition "should not be taken as exclusive or exhaustive" of all the writs available under § 1651). While it may not be commonly used, it is well suited for this case, where the 1983 TC decisions show a final agreement entered under the seal of the *Court of proper jurisdiction.*

Here there are no statutes that (1) provide for a case with inseparable issues of tax and contract, that is split into two circuits, susceptible to opposite rulings, to be appealed to this Court, or (2) determine which circuit will rule first on inseparable issues; (3) or provide any rules governing the Appeals Courts on transfers where the transfer to the 10th Circuit (FCC 2007-1126) has apparently not been received by the 10th Cir. or if it has, the 10th Cir. has not notified this counsel. Justice can not be acquired through multiple overlapping appeals from two circuits. Judicial economy will be served by accepting the petition.

Granting the petition will **(1)** assist the law of transfers of cases between Circuits [**[18]**]; **(2)** will improve the Court's appellate juris., and aid the lower Courts, as Congress has created *six courts* to hear various aspects of Tax Court decision contracts, all in play here, thus. clarifying and

confining "an inferior court to a lawful exercise of its prescribed jurisdiction or …compel[ling] it to exercise its authority when it has a duty to do so." Also See, Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943) 28 U.S.C. ' 1651(a); **(3)** will resolve the Circuits' jurisdictional split in this inseparable tax/contract BOC case, with damages exceeding $10,000; **(4)** will make the law predictable, improving judicial economy, so cases are not ping-ponging back and forth and up and down two lines of courts as this case is headed, Christopher Village, *supra*; **(5)** will resolve the split in the Circuits as to if a I.R.C. statute of limitation or other statute bar violations are jurisdictional or merely a waivable defense; **(7)** will resolve the question of whether the TPs full payment of the 1983 K, and U.S. violations of I.R.C. prerequisites to further collection, endnote 6, and false claims in the 1992 complaint, (i.e. timely assessment and timely notice and demand LC Ap 184) deprive the U.S. of a legally cognizable injury and standing, such that the DC lacked juris. to do anything short of declaring its jurisdiction *void ab initio*; **(8)** will uphold the finality of TC stipulated decision final closing agreement contracts, (Alaska Packers Assn. v. Domenico, 117 F. 99 (9th Cir. 1902)) that no other Courts', aside from the local appeals court, can destroy (I.R.C. §7121) absent fraud, mistake, etc.; **(9)** if the Court refuses the petition, the nightmare of In Re Pacific, *supra*, is 'law'. **(10)** While the CFC offered to allow TPs to claim a BOC of the 2002 'contract', they could not, as it was no 'contract' at all, the prerequisite for claiming a breach, i.e. showing the elements of a contract, were absent. The TPs complaint never pled the 2002 'agreement' was a 'contract', but only raised the breach claim *if* the Court found there was a 2002 K, and it never did. (P. Ap. 25a). CFC amended complaint. P. Ap. 29a.

The request for relief upholds, does not contradict public policy, and does no harm to the U.S., reaffirming traditional principals and law that meet the ends of justice. Powell v. Alabama, 287 U.S. 45, 68-69 (1932)) Texaco, Inc.

v. Chandler, 354 F.2d 655 (10th Cir. (1965), cert. denied, 383 U.S. 936 (1966).

A. Right to Relief Sought

Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1 Cranch 137 (1803), ("It is a settled and invariable principle ....that every right, when withheld, must have a remedy, and that every injury its proper redress.") Tax Court stipulated decisions are final closing contracts, *res judicata* for all issues like other contracts. Endnote 11. *See*, Rink v. Commissioner, 47 F.3d 168, 171 (6th Cir. 1995); Alexander v. United States, 44 F.3d 328, 332 (5th Cir. 1995). Ambiguities like boiler plate 'statutory interest' (P. Ap. 52-53a), are construed against the U.S.. (P. Ap. 52a-53a) Endnote 11, *supra*. Damages exceed $10, 000. CFC complaint. The Tucker Act mandates the CFC hear torts , tax assmt. issues intrinsic to BOC claims, exceeding $10,000 exclusively.28 U.S.C.§§1346,1491. En 17

TPs had a (1) right to seek relief under the TC and Simons' 1999, decisions, *res judicata*, and seek BOC claims exclusive to the CFC, when, as here, damages exceeded $10,000, that the DC saw clearly prior to issuing final judgment (LC Ap. 228, 230)(Crnkovich, Christopher Village, *infra,* Anthony, Hurt, Kurio, E*n 11);* (2) right to Due Process and Equal Protection of the law, that is lost permanently, and is ongoing, when evidence is withheld, (Id.) and the Federal Rules of Discovery are disregarded by the DOJ, and the US fiduciary duty to those with whom it contracts is violated administratively, (Kurio v. U. S., 429 F. Supp. 42, (S. D. Texas) (1970)), now leaving them possibly vulnerable to future IRS actions, endnote 14, as proven when the IRS billed them again for $4100 more in 2004, LC Ap 139b, in total disregard of the 1983 K and Aug. 5, 2002 DC order; **(3)** right to be free of judgments that are void, not binding on any Courts, Simons, 2004 (P. Ap. 46a) (Christopher Village. [19] e.g. Kalb v. Feuerstein, 308 U.S. 433 (1940)); **(4)** had a right to be treated honorably, endnote 11, **(5)** had a right to expect that the DOJ would report all the

foregoing undisputed facts to the DC (LC Ap 100, 109, 110) under a duty of candor to the tribunal; **(6)** had a U.S. Const. Fifth Amendment due process right to a fair and *impartial* hearing, 28 U.S.C §450a, if only under the terms of the 'offers' opt out provisions (P. Ap. 34a), (Kurio, *supra*, Grannis v. Ordean, 234 U.S. 385, 394 (1914) and by counsel, [rendered impotent by withheld, then disallowed records] Powell v. Alabama, 287 U.S. 45, 68-69 (1932)), Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. (1965), cert. denied, 383 U.S. 936 (1966). All the Courts impermissively advocated for the U.S. by denying evidentiary hearings, (CFC expressly promised Aug. 15, 2006 then dismissed without it, and held a hearing on the merits without a court reporter and refused the Clerk's notes to restructure the record, all alleviating the U.S. of a duty to rebut the TPs evidence)(CFC motion to disqualify)(the DC issued unjustified hyperbolic labels upon TPs, LC Ap 228-230, relied upon by other Courts; **(7)** had a right and duty to continue to seek records when the U.S. did not unambiguously 'accept' (endnote 12) their statute-barred D.C. 'suggested' offer (P. Ap. 34a)(violating I.R.C. §7121).

B. All Lower Courts Exceeded Their Authority Using a 2002 K as an Artifice to Cure DC's Void Juris. And Eliminate Tucker Act Exclusive Juris.

See, Kokkonen v. Guardian Life Ins., 511 U.S. 375 (1994). ("Federal courts are courts of limited juris.. They possess only that power authorized by Constitution and statute, [citations omitted] which is not to be expanded by judicial decree, American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951).") By black-letter law, "[a] court without subject-matter jurisdiction may not acquire it by consent of the parties." Fafel v. DiPaola, 399 F.3d 403, 410 (1st Cir. 2005); Freytag v. Commissioner, 1991 U.S. LEXIS 3818,*49-50 ;501 U.S. 868 (J. Scalia Concurrence); Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382

(1884) (challenge to a federal court's subject-matter jurisdiction must be made at any stage of the proceedings, and the court should raise the question *sua sponte*); Capron *v.* Van Noorden, 2 Cranch 126, 127 (1804) (judgment loser won lack of diversity juris. raised for the first time before this highest Court); Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); Krontrick, *supra*. Crnkovich v. United States 202 F.3d 1325 (Fed. Cir. 02/01/2000); Christopher Village L.P. v. United States 360 F.3d 1319 (Fed. Cir.2004). ("Congress' decision to grant exclusive jurisdiction to other courts, such as the Court of Federal Claims… render[s] void a judgment that treads upon that exclusive jurisdiction") *This Court holds that statutes of limitation restricting the U.S. to a time certain in tax activities, is jurisdictional.* Commissioner v. Lundy, 516 U.S. 235 (1996). In Lord v. Veazie, 49 U.S. (8 How.) 251, 254, 255(1850), this Court found contracts, arranged by the parties to control a Court's juris., (here under the DC's desire, intent, and 'ordered' payment P. Ap. 33a), are 'reprehensible' and a 'contempt of Court', when the Court did not rule on the issues, when statutes have not provided for the jurisdiction otherwise. Botany Worsted Mills v. United States, 278 U.S. 282, 289(1929)

DCs has juris. by clear statute wording **(1)** to issue whatever legal instruments are necessary "for the *enforcement* of the internal revenue *laws*." I.R.C. 7402; emphasis added **(2)** for any civil action *arising under any Act of Congress* providing for internal revenue," 28 U.S.C §1340 emphasis added; **(3)** Except as otherwise provided by Act of Congress, the district courts shall have original juris. of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof *expressly authorized to sue by Act of Congress*. (28 U.S.C 1345). Emphasis added. The U.S. 1992 action did not arise under 'any Act of Congress', was not 'expressly authorized to sue by Act of Congress', and was not to 'enforce' any 'laws' if

the TPs owed nothing. It was a fishing expedition, without basis in fact or law, *ultra vires* of the Constitution's Art. III standing requirements, being a 'case' and 'controversy'. In re Pacific, *supra*. Bull v. U.S., 295 U.S. 247 (1935) ("If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful.").

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, see *id.*, at 756; [citations omitted] and (b) "actual or imminent, not `conjectural' or `hypothetical,' "[citations omitted]. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."[citations omitted]. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." ...

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61(1992.

At the time of filing the 1992 US-initiated action, the U.S. had no 'invasion of a concrete or particularized legal right' to more money, had no 'actual or imminent, not 'conjectural' or 'hypothetical' harm, and no injury 'fairly traceable to the challenged action of the defendant'. Any challenged action was without any foundation in truth, given the undisputable proof of full payment, endnote 5, and no timely assessment endnote 9 and *supra,* and no timely issued IRC §6303 written notice and demand, Jersey Shore Bank v. United States, 107 S,Ct. 782, 785 (1987), prerequisites the US uniformly violated, endnote 6 (LC Ap. 100, 109, 110). To uphold the DC judgments and orders is to violate these principals, when Congress has waived any sovereign immunity in the Tucker Act and no one disputes the 1983 K was a true *bona fide* binding final closing contract. Once the

truth is known, the entire administrative file disclosed, what does the U.S. have to complain of? Here, the longer the delay of justice, the longer the delay in revealing records, the greater the injuries to the TPs, the more malignant the actions, works *for* the U.S. and against already victimized TPs with unchallengeable proof no Court will hear, due to negative labels of them in pursuing their injuries.

The 2002 consent decree can not cure non existent legal injuries, as consent can not enlarge juris: **(1)** As here, for the $55,000 payment, and accrued fees in the hundreds of thousands of dollars for a defense without key records, and millions in damages for all parties and the Court, what material consideration would the DC give for a contract with the court? None, it had no authority to rule against the TPs to begin with. **(2)** What material consideration did the U.S. give? None, it had a preexisting duty to forebear collections permanently in 1983. (Alaska Packing, *supra*). **(3)** Without the statutory prerequisites, the U.S. has insufficient interest in the outcome. Schlesinger v. Reservists Com. to Stop the War, 418 U.S. 208, 225-226 (1974). **(4)** Without DC juris., any further actions by the 10th Circuit Court, except to determine the DC judgment void and to transfer any BOC claims (as recognized June 18, 2002 LC Ap 228) to the CFC, was likewise without juris., and could be collaterally attacked in the Court of proper juris.. Crnkovich, Christopher Village, Kronkovich, Lundy, *supra*. Restatement (Second) of Judgments §12(2). **(5)** There are no Constitutional or statutory provisions alleviating the U.S. from the U.S. Constitutional Article III standing requirement, *nor are any cited by any of these Courts when the Tucker Act waives sovereign immunity;* **(6)** To consent to a jurisdiction, *contra* Congressional limits, allows parties to take the place of Congress, *Freytag*, *supra*. **(7)** Under the CFC and FCC reasoning, -a class of TPs whose TC decisions for multiple years are breached, will not be able to avail themselves of the CFC or FCC, the instant a tax law aspect is raised. Christopher Village, supra. **(8)** 28 U.S.C §§1346 and 1491,

do not alleviate the CFC's duty to hear all these TPs claims (endnote 17) based on the parties litigation activities in another Court of an invalid juris., particularly for an 'artifice' to avoid Tucker Act and Takings and other directly associated claims, when the DC made no findings on the issues. Lord, *infra*. **(9)** The 2002 'consent decree' is an artifice, to prevent these TPs who contracted with the U.S. in 1983, and honorably fully paid for that contract, from now collecting for the U.S. *chain of breaches* of that contract, that **a)** ruined their financial credit that was flawless except for the baseless IRS liens and levies, **b)** denied Mr. Simons of the free use of his property rights in his real estate license, **c)** caused Mrs. Simons and their eight children to be afraid to answer the doorbell FOR YEARS, for fear it was armed treasury agents coming to seize their property as RO Thurman documents he threatened repeatedly (LC Ap 68-73), if they did not produce documents, when RO Thurman had them and copied them secretly(LC Ap 68), **d)** interfered with Mr. Simons property interest in developing about 5000 acres in Salt Lake County, now worth over about $130 million dollars that he and his partnership took material steps to develop nearly identically as it is now, **e)** and *unrelentingly for years* oppressed every area of their lives with the full power of two of the most powerful agencies in the world, the IRS and DOJ, among other harms. In re Pacific, *supra*. **(10)** There are serious errors in the10th Cir. decision, if it was jurisdictionally valid. [20] **(11)** Only an *en banc* decision by the 10th Cir. can overturn Simons v. CIR, 1999, holding that the 1983 K was final and binding. Dubuc v. Johnson, 314 F.3d 1205, 1209 (10th Cir. 2003) (noting that a panel of this court may not overrule another panel), yet the 2004 10th Cir. decision uses a 'consent decree' to *de facto* overturn Simons 1999's and Anthony, *supra* finding of finality; **(11)** There was no FCC *en banc* hearing to disavow the binding precedent of Christopher Village and Crnkovich that should apply to reverse the CFC dismissal and FCC transfer of case 2007-1126. See, e.g., Sacco v. Dep't of Justice, 317 F.3d

1384, 1386 (Fed. Cir. 2003). **(13)** The CFC ignored the equitable tolling and continuing claims doctrines by saying the DC heard their claims, disregarding that DC never ruled on them, nor expressly extinguished them (P. Ap. 35a.[21]

3. NATURE OF THE WRITS' RELIEF

The TPs most respectfully pray for this Court to enter;

I. A Writ of Error Corum Nobis to the Honorable Judges Seymour, Brisco, Lucero of the Tenth Circuit Court, case no. 02-4201, the Honorable Judges Clevenger, Moore, Lourie of the Federal Circuit Court; the Honorable Judge Dee Benson, U.S. District Court, Utah; The Honorable Judge Susan Braden, Court of Federal Claims; to vacate all the lower Courts' decisions, as they rest upon the District Court and Tenth Circuit Courts judgments, that are without jurisdiction due to (1) lack of a valid timely assessment, and lack other statute prerequisites to collection, and (2) full payment of the 1983 contract.

II. Issue a Writ of Contract and Mandamus to the Department of Justice, Alberto Gonzales, Department of Treasury, Secretary Henry M. Paulson, Jr, and IRS Commissioner Mark W. Everson ordering them, and their agencies, to uphold the only binding final closing agreement for 1974, the 1983 agreement, forbear immediately on all further collections, and pay all Court of Federal Claims Complaint full expectation and/or full reliance damages, case no. 06-115 within 30 days by Cashier's check made out to the Taxpayers' counsel in behalf of the TPs. There is no doubt that the 1983 agreement held that 1974 was inseparable from all the other tax years, and this intent was unprovable without the District Counsel's decision, and entire administrative file records, the U.S. has not disputed. Expert report P. Ap. 64-65a.

In the alternative

III. A Writ of Mandamus to Honorable Judge Paul Michel, Chief Judge of the Federal Circuit Court, *the Honorable*

Judges Clevenger, Moore, Lourie mandating; the Federal Circuit Court of Appeals **(1)** will reverse the transfer order of case no. 2007-1126, to the Tenth Circuit Court, and consolidate it with 2007-5078; **(2)** will then transfer the consolidated case to the Court of Federal Claims as 06-115, to a new judge, with exclusive authority to hear *all matters* directly associated with claimed U.S. breaches of Tax Court decisions, **(a)** admitting *all* the TPs' evidence, **(b)** disregarding any other Court actions, statements, etc. as void; **(c)** issuing an order mandating ALL 1973 and 1974 records, without exception or privilege, be clearly copied and mailed, without charge, to the TPs' counsel, from IRS Special Procedures function, within 15 days of case arrival to the CFC; and **(d)** shifting the burden of proof to the U.S. under I.R.C. §7491, to show in what way the U.S. did not do *all* the damages in the CFC amended Complaint, and **(e)** if the CFC finds the key records were withheld until 2000, grant TPs judgment as a matter of law on all claims including liquidated and none liquidated damages as pled.

IV. A Writ of Mandamus to the honorable Judge Edward J. Damich, Chief Judge of the Court of Federal Claims, that the Court of Federal Claims implement this procedural rule, that "The IRS will, within 30 days of TPs filing a Breach of Contract claim involving taxes, produce to the Plaintiffs, at no cost to the Plaintiffs, their entire and complete admin file, master and non master file, for all years involved, *especially the District Counsel's decision (*I.R.C.§7122), without exception or privilege, including ALL emails, phone notes, and faxes, without charge for the copies to be delivered to Taxpayers' counsel, within 60 days of the complaint being filed, during which time, and for 90 days after, the U.S. shall not make a motion to dismiss or for summary judgment."

CONCLUSION

Mr. and Mrs. Simons as taxpayers who honorably paid fully in 1983, have forgiven those who so unmercifully

persecuted them on every level of their lives. With this petition they seek a level playing field, peace, finality, and full expectation or full/reliance damages for a U.S.- breach of the 1983 contract based on fraud or mistake in an impartial tribunal. The second 'contract' can not be upheld without compromising the virtue, truth and justice attaching to the first 'final' 1983 paid contract., Crnkovich, Christopher Village, Alaska Packing Kurio, Anthony, Hurt, In re Pacific, *supra*. Based on the foregoing, Mr. and Mrs. Simons, most respectfully request the Court (1) grant their petition, (2) if the Court wishes to deny this petition, in the denial, they pray for direction of their claims, to the Court of proper jurisdiction to hear ALL the claims associated with BOCs; (3) if no Court has the authority to hear all their combined tax/contract claims impartially, they pray this highest Court to declare all courts' jurisdiction void, and refer the case to Congress for a private bill to grant them relief. They pray also for this Court to issue whatever writs or whatever necessary rulings are essential to meet the "ends of justice" as is fair in equity and just under the law, to allow them to seek damage claims raised within 6 years of finding the IRS files.

Susan Rose
9553 S. Indian Ridge Drive
Sandy, UT 84092
(801)545-0441

---

[1] Lower Court Appendix (LC Ap) references page numbers are the same for the Rule 60 motion to vacate in DC, the CFC complaint appendix, the FCC motion for reconsideration of transfer for case no. 2007-1126, unless it states otherwise. P. Ap. means Petitioners' Appendix.

[2] *Simons v. CIR*, was brought when the U.S. in a FOIA response informed the TPs they had signed no consents to extend the time for assessments, (LC AP 137-138) thus making the Notice of Deficiency, finally revealed in 'discovery' about 1997, late. Only in about Feb. 15, 2000, when the IRS Special Procedures function disgorged over 1000+ pages of the TPs non master file, was it discovered a form 872 was signed, and the Notice of Deficiency was timely. (P. Ap. 127).

[3] The DC accused *the **TPs** of a 'feud'(LC Ap 229) because they were refusing to settle; were* labeled as (1) being embroiled in tax issues for years [10th Cir. Simons 1999], (P. Ap. 39a); (2) 'renegged' on a 2002 'deal' [CFC citing 10th Cir.](P. Ap. 18a, 45a); (3) refusal to pay a second time was "not in good faith" P. Ap. 32a; (4) arguments were meritless (LC Ap. 230) while the documents before this Court speak for themselves as to full payment and no timely assessment for the 1992 action.

[4] Lujan, *infra.*

[5] The IRS closed 1972 as past the statutes (LC Ap. 29), closed 1974 with a statutorily late assessment to accommodate the IRS computer unable to properly post statutory 'restricted interest" . RO Thurman writes statutory 'restricted' interest applies to 1974 (LC Ap 72) (P. Ap. 57a), and LC Ap. 57-58 [IRS drafted and signed form 872], where ASED is calculated to be 6-24-83. April 1997, United States Treasury Report to Congress NETTING OF INTEREST ON TAX OVERPAYMENTS AND UNDERPAYMENTS, at page 8, (see pgs. 8-10 for rules before 1986)("Certain interest is statutorily prohibited or is limited to specific time periods as a matter of law. *These "restricted interest" computations can be particularly complex ….**the IRS does not have the capability to perform all restricted interest computations automatically on its Master File system**.*") emphasis added. Only 1973 was left open on the IMF. only one year was open into which the money would post, 1973. All the $49,546.55 as collected for all three years with restricted 'statutory interest', was posted into only 1973's account with full 'statutory interest'. LC Ap. 69, 99. *Endnote 4, supra.*

The IRS closed all three years in 1983(LC Ap 62a, 9-10) P. Ap. 64a-65a. $49,546 for only 1973 was over $2000 off, so a penalty, never agreed to, was added. (LC Ap 99). **(1)**TPs reconstructed how the $49,546.55 payment would apply to all three years, using Rev. Proc. eight place factoring tables, with 'restricted' interest **to within .07 cents** of this amount, an 'astronomical rare' feat, according to 23 year IRS veteran Gail Anger, unless it is how the IRS calculated it at the time of collection. LC Ap. 121, 52-53. **(P. Ap. 50a-51a) (2)** The DOJ's client, IRS, also zeroed out the 1974 tax year three times, 1975, 1983 and 1995, (LC Ap. 100-110). The IRS 1992 complaint, and the IRS computerized certificate of assessments do not list these zero assessments, and no one told the parties or the Court that the IRS had determined on the computer nothing was owed after 1995. (LC Ap 184, 64). Instead, the DOJ 'as per inst DOJ Jeff Snow' , 7-21-2001, replaced the IRS- 1995 deleted debt, back onto the computer, back dating it to 1995. Now the U.S.' key evidence (IMF) an amount is owed, is being manufactured by the U.S.. (LC Ap. 111, 110). And while the offer of 3/21/2001 was made,

discussed below, and the U.S.' 5/25/2001 'counteroffer', **ZERO was showing as owed on the 1974 IRS computer account**. LC Ap. 110, 111. **(3)** The IRS pattern of omission (Endnote 11) of TP protections was either gross error by multiple levels of IRS management in multiple offices, [unlikely] **OR** purposeful to protect these TPs from further collection by violating the statutory prerequisites to District Court juris..... – if TPs had their non masterfile records. **(4)** And a computer readout is no proof of a written notice and demand. U.S. v. Berman, 825 F.2d 1053, 1056-1057 (6th Cir. 1987), particularly when the IMF lacks Notice of Deficiency, form 872 extension, lien, and other essential codes for both 1973 and 1974 (LC Ap. 98-99, 103-110).

[6] Pattern of IRS 1983 omissions. Unchallenged and unchallenge*able* proof shows there was; **(1)** *no* I.R.C.§§ 6501, 6503, timely assessment (LC Ap. 5, 57-59 [form 872], 100, 109-110 Trsy. Dpt. admission); **(2)** *no* identification of the specific 'statutory' interest for the TC decisions in the IRS-drafted documents(LC. Ap. 6-10, 12-21, 28-30)(P. Ap.) as required by policy and two Circuit Courts (IRM 8.7/1.1.2 and 35.10.7 and *Anthony, Hurt, supra;* **(3)** *no* timely written notice of assessment and demand for payment (LC. Ap. 100, 109, 110) (I.R.C.§6215), (LC. Ap. 100) within 60 days after the 7-25-83 assessment for 1974 *or 1973's assessment* (LC App 99). (I.R.C.§§6303, 6501, 6503); **(4)** *no* I.R.C.§6321 *prior* written letter of intent to levy, PRIOR to the 1988 levies and initial lien (LC. Ap. 81-84) (depriving them of any administrative appeal prior to the 1992 Court action); **(5)** *no* I.R.C.§§6212,6213 Notices of Deficiency on I.R.C. §6204 supplemental assmts. Singleton v. U. S. 128 F.3d 833 (4thCir. 1997); **(6)** no receipt for payment.

[7] By fraud or mistake the following key *non master* file documents were U.S.-withheld (LC Ap. 64, 125, 123, 117-119, 127) for 12 years; **(a)** original returns (LC Ap 52) showing 3 year I.R.C. § 6501 ASED applies; **(b)** the internal 'quick assessment' form (P. Ap. 57a) showing the ASED date as 7-19-83; **(c)** the form 872 extension of the ASED to a time certain (LC Ap 57-59) whereby the ASED date is calculated as 6-24-83[7]; **(d)** ***the 1983 district counsel's decision*** showing, (i) unequivocal agreement; (ii) appeals office approval; (iii) meeting of the minds; (iv) a formal agency-recognized closing TC forms; (v) inseparability of '72,'73 and '74; (vi) lack of U.S. ability to prove fraud; (vii) final 'resolution of this case." (P. Ap 60a); Simons v. CIR, 1999 made its ruling without this information. (P. Ap. 38a). *See abbreviated expert report by Mr. Bryan Bolander, CPA, current president of the Utah association of CPAs. (**P. Ap. 64a-65a**, LC Ap. 6-10).*

[8] The Taxpayers had a burden of proof to show the U.S. was in error, but without their records, that burden could not shift as in IRC §7491, ... *and*

*the **IRS in 1988** knew this*, (LC Ap. 68, 71a) when RO Thurman stated he"told him [CPA] without any evidence bal due was in error I must proceed with ECA [enforced collection action, seizure]. " Id, and he shows he copied them LC Ap. 68. *and the **DOJ in 1992** knew this* when it was contacting Special Procedures function in Wyoming, [where records were found LC Ap 127], November 14, 1996, for account information, when TPs prior attorney, October 14, 1996, Patricia White, current dean of the Sandra Day O'Connor School of Law and published tax author, was informing the DC "the IRS has apparently destroyed all of the documentation ... for Mr. and Mrs. Simons' liability for 1973 and 1974." LC Ap. 64, and Mr. Lusty did not correct her or the Court, but in 1995 the IRS did ZERO out the account again, without anyone informing the Court or the opposing counsel.

[9] **No Circuits disagree that the time certain of the form 872 should apply, under contract principals.** The consent already gave the U.S. an additional year over the three year ASED I.R.C. § 6501statutes. Ripley v. Comm'r, 4th Cir. case no. 96-1173, Dec. 18, 1996. Using a **Julian Calendar** we find this simple mathematical formula, given the form 872 date April 15, 1979, plus 60 days (Aplt. App. 57-58), plus 3 days remaining on the 90 days suspension between the Notice of Deficiency and the July 13, 1979 (Simons v. C.I.R., supra) tax court petition filing date. (P. Ap. 39a). April 22, 1983 Stipulated decision date = Julian date no. 2445446.7311 + 63 days from the form 872 = Julian date no. 2445509.7311 which is an ASED date of **June 24, 1983**, a Friday. About 30 days prior to7-25-1983.

[10] City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998))(' A binding ....contract arises between a private party and the government *upon proof*... of: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) "actual authority" on the part of the government's representative to bind the government.") **(1)** There was a 1983 final closing agreement (1983 K) for three *inseparable* 1972, 1973, and 1974 years, 1972, 1973, and 1974. (See, *mutuality of intent* to contract, **(A)** offer letters (LC Ap. 22, 25, P. Ap. 59a); **(B)** IRS Appeals office approved District Counsel's decision showing acceptance of offer and all three years would be '*treated together*' (LC Ap 28, P. Ap. 60a-63a)); **(C)** *identical stipulated* IRS-drafted TC rule 155 computations *income averaging* all three years, making them legally and mathematically *inseparable* (LC Ap. 16-21, P. Ap. 56a, 64a-65a). **(D)** The parties agreed to memorialize the single package agreement in two IRS-drafted U.S. Tax Court *stipulated* decisions, (P. Ap. 60a, 52a-53a). **See P. Ap. 64a-65a**. **(2)** Simons v. CIR, 10th Cir. docket no. Nos. 98-9012 & 98-9013, issued 7/12/1999

upholds 1983 K as final, noting the foregoing, though it did not have all these documents, particularly District Counsel's decision.(P. Ap. 39a). *Material consideration* was $49,546.55, and the U.S. inherent promise to end all claims, which they did, but for only 5 years. The no one disputes the persons signing the documents *had 'actual authority' to sign* them. The date differences between the signing and entry in the TC is likely due to the TC riding Circuit in Utah April 22, 1983. (P. Ap. 52-53a) .

[11] Anthony v. United States,987 F.2d 670(10th cir.1993), Hurt v. United States, 70 F.3d 1261(4th Cir.1995); Kurio v. U. S., 429 F. Supp. 42, (S. D. Texas) (1970))

[12] The U.S. *rewrites* the offer May 25, 2001, [while the computer showed ZERO owing LC Ap. 110,111)] eliminating the word 'worldwide' and parties' names, limiting it to only the U.S. and the Simons, ***'in this case'***:

> "Mr. Simons, by cashier's or certified check, will within 30 days after acceptance, pay to the United States $55,000 dollars in return for a release of all claims in any way related to the matters in this case, which claims will be forever discharged, released and extinguished; and any and all liens and assessments raised in this case, shall be released against the defendants.

Please be advised that the offer has been accepted by a duly authorized delegate of the Attorney General ***conditioned upon*** the parties' understanding that: (1) it is the claims asserted by the parties *in this case* which are being released, discharged, and extinguished, (2) with the assessments and tax liens against Mr. and Mrs. Simons for 1974, 1982 and 1987, [already dismissed] as raised herein, being marked satisfied and released, respectively, (3) with the parties to bear their own costs and attorneys fees, and (4) after the described payment is made, the parties will stipulate to a dismissal of their case with prejudice.

If the proponent agrees to the conditions set forth above, then the Simons need to cause a cashier's or certified check, made payable to the U.S.. Treasury to be received at this office within 30 days after your receipt of this letter. Upon receipt of that check, we will forward to you an executed stipulation to dismiss with prejudice, and we will cause to be released the tax liens which are subject of this proceeding with the underlying assessments being marked satisfied." LC Ap 207-208.emphasis added.[ ] counsel insert.

[13] *See*, City of Cinncinati, supra En 10, For 2002, there is **(1)** *no* mutuality of intent (LC AP. 227) (DC states June 18, 2001, "***We are here following a settlement effort which…. did not happen***" (LC Ap 227); the TPs made a motion to dismiss based on void juris. (P. Ap. 45a) ; **(2)** *no* material consideration **(a)** by the Court, as it had a duty to examine its void juris., that would have extinguished the U.S. claims without the

$55,000 payment; **(b)** the U.S. had a pre existing duty to forbear collections in 1983, that can not suffice as material consideration. Alaska Packers Assn. v. Domenico, 117 F. 99 (9th Cir. 1902); **(3)** *no* unambiguous acceptance, compare **(a)** P. Ap. 34a "worldwide" offer that would encompass future claims, with **(b)** 5-25-01 counteroffer, eliminating the word 'worldwide', preserving U.S. future claims, Kurio, *supra*; with **(c)** the fact the U.S. July 26, 2001 objected to the final August 5, 2002 DC judgment 'consent' decree based on the 'handwritten offer', the U.S. supposedly 'agreed' to (LC Ap 206); **(4)** *no* delegated authorized DOJ signature with authority to bind the U.S., *as told to the DC, is on the handwritten offer*. (LC App. 222); **(5)** *no* formal and or agency-recognized 960 form for a *closing* agreement (endnote 10); **(6)** *violates* public policy of 28 U.S.C §§7121, 2201, among the above U.S. violated I.R.C. prerequisites to the DC authority to hear the U.S. claims; **(7)** based on the DC's displeasure over the length of the case, due to 12 years of withheld evidence that was *fraud or mistake* and for which the U.S. had an ongoing duty to disclose; (8) the IRS, at the time of offer and counteroffer, showed zero was owing on the 1974 IMF, - until it was replaced in 7-20-01 'as per inst DOJ Jeff Snow'. LC Ap 111, 110. It was backdated to the 1995 zero date. (id) The IMF proof is now DOJ altered.

[14] "COD income," refers to income arising from a "discharge of indebtedness." [citation omitted] For tax purposes, a discharge of indebtedness is defined as "gross income." See I.R.C.§ 61(a)(12) 108. "Forgiveness of debt is income because it frees up assets that the TP previously had to dedicate toward repaying its obligations." Pugh v. Comm'r, 213 F.3d 1324, 1326-27 (11th Cir. 2000) (citations omitted). [This statute is possibly a 'double tax' as the tax has already been paid on the earned income that would be used for the debt].

[15] "....The authority of officers...to compromise claims on behalf of or against the United States is strictly limited. ... The statutes which authorize conclusive agreements and settlements to be made in particular ways and with the approval of designated officers raise the inference that adjustments or settlements made in other ways are not binding.', Botany.

[16] "The assmt. is the official recording of liability that triggers levy and collection efforts". Hibbs v. Winn, 2004 U.S. LEXIS 4175,*25;124 S. Ct. 2276. 26 U.S.C.§6203.

[17] The Court of Federal Claims, though an Article I court, 28 U.S.C. §171 (2000), applies the standing requirements enforced by the other Art. III federal courts. Glass v. United States, 258 F.3d 1349, 1355-56 (Fed. Cir.2001); CW Gov't Travel, Inc. v.United States,46 Fed. Cl. 554, 557-58 (2000),and 28 U.S.C. §2519 (2000) (mandating the Court of Federal Claims to enter final judgments in any "claim, suit, order, demand against

the United States arising out of the matters involved in the case or controversy.")). CTA Incorporated, v. United States, 44 Fed. Cl. 684, 698 (1999) See also Edwards v. United States, 19 Cl. Ct. 663, 669 (1990). Wood v. United States, 961 F.2d 195, 198 (Fed. Cir. 1992) (citation omitted). For tax assmt. issues. Crnkovich v. United States, 202 F.3d 1325 (Fed. Cir. 02/01/2000); Christopher Village L.P. v. United States, 360 F.3d 1319 (Fed. Cir.2004).

[18] Counsel just received a FCC copy of the 2/1/07 transfer order issued as a mandate 3/20/07. The order fails to address that the FCC has jurisdiction within 28 USC 1295(a)(1),(2) *if the District Court lacks jurisdiction* and exclusive under 28 USC 1292(d)(4))B). Christopher Village. The Court is creating the argument of the United States who need not even raise it without looking or mentioning the 1983 breached contract, as if it no longer exists.

[19] The Restatement allows a collateral attack when "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government." Id. § 12(2); [citations omitted.]"

[20] The 10th cir. in Simons 2004, (1) observes a DC 'suggested' handwritten offer (P. Ap. 34a) is fairly mirrored in the DC final judgment (P. Ap. 35a) , but ignores the offer is not mirrored in the U.S. counteroffer (endnote 12) (2) dismisses the foregoing TP arguments, "objections to the government's case" , saying the law cited was not relevant, but not showing the TPs for future appeal, what objections, what law, fails and why. (P. Ap. 47a); (3) Finally, the DC stated, "You can pay half of what the IRS is going to assess if I enter this order, ten days from now, and then you can go ahead and appeal to the Tenth Circuit..." P. Ap. 46a-47a. The TPs understood this statement to mean that they (1) could pay half [actually $55,000 was maybe ¼ or less].... (2) ten days from now, with 'this order' meaning-not 'summary judgment', as the 10th Cir. inserts, - but meaning the June 20, 2002 '*ten day*' order to pay. P. Ap. 33a. mistake. As proof, the August 5, 2002 order, does not extinguish one single TP claim, only the government's, to which the U.S. objected, (P. Ap. 35a-36a).

[21] The CFC complaint was filed within 6 years of the finding of their records. The doctrine of equitable tolling applies, when the claimant has (1) actively pursued his judicial remedies but filed a defective pleading during the statutory period, *or in the wrong court*, [here a DC counterclaim and amended counterclaims]; (2) been induced by fraud by his opponent's conduct (hiding of evidence for 12 years) into allowing the filing date to expire, or (3) missed the filing date due to the government's concealment of the facts and evidence. See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990). The continuing claims doctrine has been

applied when the government owes a continuing duty [here a contractual fiduciary duty and judicial discovery rule duty and FOIA duty to disclose or disclose the whereabouts, of all their records] to these TPs. See, Boling v. United States, 220 F.3d 1365, 1373 (Fed. Cir. 2000). Each breach gives rise to a separate cause of action, and a plaintiff may bring suit for any breaches that occurred within the statute of limitations period. See id. (citing Hatter v. United States, 203 F.3d 795, 797-98 (Fed. Cir. 2000) (en banc)); see also Mitchell v. United States, 10 Cl. Ct. 63, 75, as modified, 10 Cl. Ct. 787 (1986).

(any footnotes trail end of each document)

2007-1126

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

DAN C. SIMONS (Individually and as Trustee of the Dan C. Simons Equity Trust) and SALLY J. SIMONS (Individually and as Trustee of the Dan C. Simons Equity Trust), Defendants-Appellants, and JOLENE J. SMITH (As Trustee of the Charlemagne Trust), FIRST CITY CORP., and HAROLD MARK SIMONS, Defendants.

February 1, 2007, Decided
February 1, 2007, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

COUNSEL: For Dan C. Simons (Individually & Trustee of Dan C Simons Equity Trust), Sally J. Simons (Individually & Trustee of Dan C Simons Equity Trust), Defendants-Appellants: ROSE, SUSAN, PRINCIPAL ATTORNEY, Sandy, UT.

JUDGES: Before LOURIE, Circuit Judge, CLEVENGER, Senior Circuit Judge, and MOORE, Circuit Judge.

OPINION BY: Alan D. Lourie

OPINION: ORDER

Upon review of Dan C. Simons et al.'s (Simon) recently docketed notice of appeal, we consider whether this appeal should be transferred to the United States Court of Appeals for the Tenth Circuit.

The United States filed an action in the United States District Court for the District of Utah to reduce a tax assessment to judgment. United States v. Simons, No. 92-CV-1071. After settlement discussions, Simon paid the agreed sum and submitted an order to dismiss the action. Simon appealed to the Tenth Circuit, which affirmed the dismissal on January 22, 2004. On September 14, 2006, Simon filed a motion to vacate in the district court. The district court denied the motion, and Simon appeals.

This court's jurisdiction over appeals of district court decisions is limited primarily to cases involving patents and suits against the United States not exceeding $ 10,000. See 28 U.S.C. § 1295 (a)(1), (2). This court lacks jurisdiction over an action filed by the United States to obtain judgment on a tax assessment. Furthermore, we note that prior appeals in this case were decided by the Tenth Circuit.

Accordingly,

IT IS ORDERED THAT:

This case is transferred to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1631.

FOR THE COURT

Alan D. Lourie, Circuit Judge

Note: This order is nonprecedential

2007-1126

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

DAN C. SIMONS (Individually and as Trustee of the Dan C. Simons Equity Trust) and SALLY J. SIMONS (Individually and as Trustee of the Dan C. Simons Equity Trust), Defendants-Appellants, and JOLENE J. SMITH (As Trustee of the Charlemagne Trust), FIRST CITY CORP., and HAROLD MARK SIMONS, Defendants.

ON MOTION

Before CLEVENGER, Senior Circuit Judge, and MOORE, Circuit Judge.

LOURIE, Circuit Judge.

ORDER

Dan C. Simons et al. move for reconsideration of the court's February 1, 2007 order transferring their appeal to the United States Court of Appeals for the Tenth Circuit.

Upon consideration thereof,

IT IS ORDERED THAT

(1) The motion is denied.

(2) All other pending motions are moot

2/27/2007

In the United States Court of Federal Claims
No. 06-115C
Filed: February 21, 2007

DANNY C. SIMONS and SALLY J. SIMONS,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Susan Rose, Sandy, Utah, counsel for plaintiff.

Michael N. O'Connell, Jr.,United States Department of Justice, Commercial Litigation

Branch, Washington, D.C., counsel for defendant.

MEMORANDUM OPINION AND FINAL JUDGMENT

I. RELEVANT FACTS AND PROCEDURAL HISTORY.[1]

This case arises from a long-standing dispute between Plaintiffs and the Internal Revenue Service ("IRS") regarding two settlement agreements that were intended to resolve all litigation concerning disputed tax payments made in the 1970s and 1980s. The First Settlement Agreement resolved two tax deficiency cases that were pending before the United States Tax Court, memorialized "by agreement of the parties" in two decisions of that court issued on April 22, 1983. See Decision, Simons et al. v. Comm'r of Internal Revenue, No. 10312-79 (T.C. Apr. 22, 1983); Decision, Simons et al. v. Comm'r of Internal Revenue, No. 10316-80 (T.C. Apr. 22, 1983). The Second Settlement Agreement resolved a case instituted in 1992 in the United States District Court for the District of Utah to collect a 1974 tax assessment, as well as

tax deficiencies for 1982 and 1987. See United States v. Simons, 86 Fed. Appx. 377 (10th Cir. 2004) (affirming the District Court's ruling that Plaintiffs had entered into a valid, binding settlement agreement ending the tax litigation.)

On November 30, 2006, the court issued a Memorandum Opinion and Order granting-in-part and denying-in-part the Government's June 29, 2006 Corrected Motion to Dismiss. Therein, the court dismissed Plaintiffs' April 3, 2006 Amended Complaint, except those allegations that appeared to state a claim for breach of the Second Settlement Agreement. Plaintiffs were granted leave to amend the Complaint to provide a more definite statement of such a claim so the court could ascertain whether jurisdiction had been established. See Simons v. United States, - Fed. Cl. -, 2006 WL 3488862 at *7.

On December 8, 2006, Plaintiffs filed a Motion for Clarification, Amendment and Reconsideration/Reversal of the Court's November 29, 2006 Order of Dismissal, pursuant to RCFC 59 and 60. On December 11, 2006, Defendant ("Government") filed a Response. On December 15, 2006, Plaintiffs filed a Reply. On December 15, 2006, Plaintiffs also filed a Motion for Entry of Judgment under RCFC 54(b). On January 8, 2007, Plaintiffs filed a Notice of Appeal indicating their intent to "appeal to the United States Court of Appeals for the Federal Circuit from this Court's [November 30, 2006] dismissal, pursuant to judgment/order." On January 9, 2007, Plaintiffs filed a Motion to Stay Proceedings.

On January 10, 2007, the court held a telephone status conference to ascertain whether Plaintiffs intended to further amend the April 3, 2006 Amended Complaint. Plaintiffs' attorney represented that, because Plaintiffs contested the validity of the Second Settlement Agreement, they elected not to amend. During that conference the court entertained argument on Plaintiffs' December 8, 2006, Motion for

Clarification, Amendment, and Reconsideration/Reversal. Thereafter, the court advised the parties that an Order would be issued, converting the November 30, 2006 Memorandum Opinion and Order to a Final Judgment dismissing Plaintiffs' April 3, 2006 Amended Complaint. The court requested that the Government file a summary document in response to Plaintiffs' remaining motions by February 2, 2007. The court also invited Plaintiffs to file a Reply.

On January 11, 2007, Plaintiffs filed a Motion and Memorandum to Apply a RCFC 56 Standard for Dismissal Instead of a RCFC 12 Standard. On January 19, 2007, the Government filed a Supplemental Response to Plaintiffs' December 8, 2006 Motion for Clarification, Amendment and Reconsideration/Reversal. On February 6, 2007, the Government filed a Response to Plaintiffs' January 11, 2007 Motion to Apply a RCFC 56 Standard for Dismissal.

On January 22, 2007, Plaintiffs filed a Motion and Memorandum to Disqualify the Court and Reassign Case. On February 1, 2007, the Government filed an Opposition. On February 15, 2007, Plaintiffs filed a Reply.

II. DISCUSSION.

A. Plaintiffs' April 3, 2006 Amended Complaint Does Not State A Claim Over Which The United States Court of Federal Claims Has Jurisdiction.

As discussed herein, the court's November 30, 2006 Memorandum Opinion and Order dismissed Plaintiffs' April 3, 2006 Amended Complaint, except those allegations that appeared to state a claim for breach of the Second Settlement Agreement. Accordingly, Plaintiffs were provided with the opportunity to further amend the April 3, 2006 Amended Complaint to provide a more definite statement of such a claim. Plaintiffs, however, have elected not to further amend.

Since the April 3, 2006 Amended Complaint does not state a claim over which the court has jurisdiction, the Clerk of the United States Court of Federal Claims is hereby ordered to dismiss Plaintiffs' April 3, 2006 Amended Complaint.

B. The Court's Disposition Of Other Outstanding Motions.

In order to facilitate any appeal of the court's November 30, 2006 Memorandum Opinion and Order and this Memorandum Opinion and Final Judgment to the United States Court of Appeals for the Federal Circuit, the court hereby resolves other outstanding motions filed by Plaintiff.

1. Plaintiffs' June 13, 2006 Motion To Strike.

On June 13, 2006, Plaintiffs filed a Motion to Strike the Government's May 13, 2006 Motion to Dismiss. On November 30, 2006, the court issued a Memorandum Opinion and Order granting in-part, and denying-in-part the Government's June 29, 2006 Corrected Motion to Dismiss. Because Plaintiffs' June 13, 2006 Motion to Strike addressed substantive issues raised by the Government in the May 13, 2006 Motion to Dismiss, the court treated Plaintiffs' Motion to Strike as a Response to the Government's Motion to Dismiss. See Simons, 2006 WL 3488862 at *2 ("On June 13, 2006, Plaintiffs filed a Response [to the Government's Motion to Dismiss], captioned as a Motion to Strike the Government's Motion to Dismiss."). Plaintiffs' June 13, 2006 Motion to Strike, however, is now moot in light of the court's jurisdictional ruling herein.

2. Plaintiffs' June 29, 2006 Motion To Amend Pleadings.

On June 29, 2006, Plaintiffs filed a Motion to Amend

Pleadings to add a claim of fraud upon the court arising from prior litigation before the United States District Court for the District of Utah. See Plaintiffs' Memorandum in Support of Motion to Amend Complaint at 1, Simons v. United States, 06-115C (Fed. Cl. June 29,2006). This claim apparently is based upon Plaintiffs' belief that the Government's Motion for Summary Judgment filed in the United States District Court for the District of Utah was "filled with misrepresentations." See Plaintiffs' Motion to Amend at 2, Simons v. United States, 06-115C (Fed. Cl. June 29, 2006) ("Pl. Mot. Amend").

Under RCFC 15(a), a party may only amend a pleading once as a matter of course; all subsequent amendments are within the discretion of the trial court. See RCFC 15(a); see also Mitsui Foods, Inc. v. United States, 867 F.2d 1401, 1403 (Fed. Cir. 1989). Grounds for denying a motion to amend under RCFC 15(a) include: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Te-MoakBands of Western Shoshone Indians of Nevada v. United States, 948 F.2d 1258,1260 (Fed. Cir. 1991) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)); see also Mitsui Foods, Inc. v. United States, 867 F.2d 1404-04 (Fed. Cir. 1989). Where "futility is asserted as a basis for denying a proposed amendment, courts do not engage in an extensive analysis of the merits of the proposed amendments[.] . . . Instead, courts simply decide whether a party's proposed amendment is facially meritless and frivolous[.]" St. Paul Fire & Maine Ins. Co. v. United States, 31 Fed. Cl. 151, 155 (1994) (citing State of Alaska v. United States, 15 Cl. Ct. 276, 280 (1988)).

Plaintiffs' June 29, 2006 Motion to Amend Pleadings seeks to relitigate a Motion for Summary Judgment filed by the Government in prior litigation in another federal forum. See Pl. Mot. Amend at 4-9.c Plaintiffs had the opportunity to

contest the Government's Motion for Summary Judgment in the United States District Court of Utah. In fact, as the Government explains, Plaintiff made these arguments in that litigation and they were rejected by the District Court. See Response at 2-4, Simons v. United States, 06-115C (Fed. C1. July 17, 2006). Accordingly, Plaintiffs' Motion to Amend Pleadings is denied on grounds of futility, since the proposed claim is barred by res judicata. See Federated Dept Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

3. Plaintiffs' July 13, 2006 Motion For Partial Summary Judgment.

Because the court has determined that it does not have jurisdiction to adjudicate any of the claims alleged in Plaintiffs' April 3, 2006 Amended Complaint, Plaintiffs' July 13, 2006 Motion for Partial Summary Judgment is also denied as moot.

4. Plaintiffs' July 14, 2006 Motion To Correct Clerical Errors.

On July 14, 2006, Plaintiffs filed a Motion to Correct Clerical Errors in Plaintiffs' July 13, 2006 Motion for Summary Judgment and Plaintiffs' July 14, 2006 Reply. Because the court does not have jurisdiction to adjudicate any of the claims alleged in Plaintiffs' April 3, 2006 Amended Complaint, this motion is also denied as moot.

5. Plaintiffs' July 14, 2006 Motion To Strike; July 19, 2006 Motion For A Hearing Thereon; August 5, 2006 And August 9, 2006 Motions To Strike.

On July 14, 2006, Plaintiffs filed a Motion to Strike the

Government's June 30, 2006 Response to Plaintiffs' June 13, 2006 Motion to Strike, citing RCFC 7 and 12(f). On August 5, 2006, Plaintiffs filed a Motion to Strike Defendant's July 31, 2006 Response. On August 9, 2006, Plaintiffs also filed a Motion to Strike the Government's August 2, 2006 Reply.

Because the court does not have jurisdiction to adjudicate any of the claims alleged in Plaintiffs' April 3, 2006 Amended Complaint, Plaintiffs' July 14, 2006, July 19, 2006, August 5, 2006 and August 9, 2006 motions are denied as moot.[2]

6. The Government's July 18, 2006 Motion To Stay Responses.

On July 18, 2006, the Government filed a Motion to Stay Plaintiffs' July 13, 2006 Motion for Partial Summary Judgment and Plaintiffs' July 14, 2006 Motion to Strike. Because the court does not have jurisdiction to adjudicate any claims alleged in Plaintiffs' April 3, 2006 Amended Complaint, this motion is denied as moot.

7. Plaintiffs' September 1, 2006 Motion To Stay Proceedings.

On September 1, 2006, Plaintiffs filed a Motion to Stay Proceedings until the United States District Court for the District of Utah considered a Motion to Vacate, filed by Plaintiffs, regarding the Second Settlement Agreement. On December 11, 2006, the United States District Court for the District of Utah denied Plaintiffs' Motion to Vacate. See Order, United States v. Simons, No. 921071 (D. Utah Dec. 11, 2006). Accordingly, Plaintiffs' September 1, 2006 Motion to Stay Proceedings is denied as moot.

8. Plaintiffs' December 8, 2006 Motion For Clarification, Amendment And Reconsideration/Reversal Of The Court's November 29, 2006 Order Of Dismissal.

On December 8, 2006, Plaintiffs filed a Motion for Reconsideration of the court's November 30, 2006 Memorandum Opinion and Order, pursuant to RCFC 59. Because Plaintiffs have failed to identify or evidence any manifest error of law or mistake of fact, however, Plaintiffs' Motion for Reconsideration is denied. See Coconut Grove Entm't, Inc. v. United States, 46 Fed. Cl. 249, 255 (2000) (holding that to prevail on a Motion for Reconsideration, a movant must "point to a manifest error of law or mistake of fact" (citing Franconia Assoc. v. United States, 44 Fed. Cl. 315, 316 (1999))).

Plaintiffs' December 8, 2006 Motion also seeks relief from the court's November 30, 2006 Memorandum Opinion and Order pursuant to RCFC 60(b). RCFC 60(b) allows the court to "relieve a party ... from a final judgment, order, or proceeding" for six enumerated reasons.[3] See RCFC 60(b). Plaintiffs' Motion fails to state the particular grounds under which they seek relief pursuant to RCFC 60(b). See RCFC 7(b)(1) ("An application to the court for an order shall be by motion which ... shall state with particularity the grounds therefor[.]") (emphasis added). Furthermore, Plaintiffs' Motion does not provide a substantive basis for the court to grant relief from the November 30, 2006 Memorandum Opinion and Order. Id. Instead, Plaintiffs reargue the same contentions raised in other motions. Accordingly, Plaintiffs' December 8, 2006 Motion is denied.

9. Plaintiffs' December 15, 2006 Motion For Entry Of Judgment Under RCFC 54(b).

On December 15, 2006, Plaintiffs filed a Motion for Entry of Judgment, pursuant to Rule 54(b). RCFC 54(b) provides that where there is more than one claim for relief, the court may enter final judgment as to one or more, but fewer than all of the claims, upon the "express determination that there is no just reason for delay." See RCFC 54(b). Since Plaintiffs have elected not to amend the April 3, 2006 Amended Complaint

to allege a claim over which this court has jurisdiction, the court has entered a final judgment dismissing Plaintiffs' April 3, 2006 Amended Complaint. Accordingly, Plaintiffs' December 15, 2006 Motion for Entry of Judgment is denied as moot.

10. Plaintiffs' January 9, 2007 Motion To Stay Proceedings.

On January 9, 2007, Plaintiffs filed a Motion to Stay Proceedings, "under RCFC Rule 62 and 7 ... due to an appeal of this Court's November 30, 2006 Order that dismissed the Plaintiffs' entire complaint, with permission to amend, and the appeal from the United States District Court of Utah, central division, refusal to vacate its judgment/orders of 2001, and 2002, [sic] refusal to remand these Plaintiffs' Contract claims to this Court." See Memorandum Supporting Motion to Stay at 1, Simons v. United States, 06-115 (Fed. Cl. Jan. 9, 2007). Plaintiffs' January 9, 2007 Motion is denied since this case is not a proper subject for interlocutory appeal and the court's Final Judgment entered herein provides Plaintiff with the opportunity to appeal.

11. Plaintiffs' January 11, 2007 Motion To Apply A Rule 56 Standard For Dismissal Instead Of A Rule 12 Standard.

On January 11, 2007, Plaintiffs filed a Motion to Apply a Rule 56 Standard for Dismissal of the Complaint Instead of a Rule 12 Standard. See Memorandum in Support of Plaintiffs' Motion at 1, Simons v. United States, 06-115C (Fed. Cl. Jan. 11, 2007).

The United States Court of Federal Claims may grant reconsideration "for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RCFC 59(a)(1). The decision to grant a motion for reconsideration is within

the court's discretion. See Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (holding that "the decision whether to grant reconsideration lies largely within the discretion of the [trial] court"). To prevail, the moving party must identify a manifest error of law or mistake of fact. See Coconut Grove Entm't, Inc. v. United States, 46 Fed. Cl. 249, 255 (2000) (holding that a movant must "point to a manifest error of law or mistake of fact").

RCFC 59(b) provides that "a motion for. . . reconsideration ... shall be filed no later than 10 days after the entry of judgment." RCFC 59(b) (emphasis added). Plaintiffs motion, however, was not filed until January 11, 2007, well after the ten day time period had elapsed. Accordingly, Plaintiffs' January 11, 2007 Motion to Apply a Rule 56 Standard for Dismissal of the Complaint is denied.

12. Plaintiffs' January 22, 2007 Motion to Disqualify. Finally, on January 22, 2007, Plaintiffs filed a Motion to Disqualify requesting that the court to reassign this case to a new judge. Because the United States Court of Federal Claims does not have jurisdiction to adjudicate any claims alleged in Plaintiffs' April 3, 2006 Amended Complaint, the court also denies this motion.

III. CONCLUSION.

The Clerk of the United States Court of Federal Claims is directed to dismiss Plaintiffs' April 3, 2006 Amended Complaint. In addition, with respect to other outstanding motions, the parties and the Clerk are advised of the following final dispositions:

Plaintiffs' June 13, 2006 Motion to Strike was converted to a Response to the Government's May 13, 2006 Motion to Dismiss at the direction of the court, and is moot;
Plaintiffs' June 29, 2006 Motion to Amend Pleadings is

denied;
Plaintiffs' July 13, 2006 Motion for Partial Summary Judgment is denied as moot; Plaintiffs' July 14, 2006 Motion to Correct Clerical Errors is denied as moot;
Plaintiffs' July 14, 2006 Motion to Strike, July 19, 2006 Motion for a hearing thereon, August 5, 2006 and August 9, 2006 Motions to Strike are denied as moot;
Defendant's July 18, 2006 Motion to Stay Responses is denied as moot;
Plaintiffs' July 19, 2006 Motion seeking a hearing on Plaintiffs' Motions to Strike is denied; Plaintiffs' September 1, 2006 Motion to Stay Proceedings is denied;
Plaintiffs' December 8, 2006 Motion for Clarification, Amendment and Reconsideration/Reversal of the Court's November 29, 2006 Order of Dismissal is denied pursuant to RCFC 54(b);
Plaintiffs' December 15, 2006 Motion for Entry of Judgment under Rule 54(b) is denied as moot;
Plaintiffs' January 9, 2007 Motion to Stay Proceedings is denied;
Plaintiffs' January 11, 2007 Motion to Apply a Rule 56 Standard for Dismissal is denied as untimely filed; and
Plaintiffs' January 22, 2007 Motion to Disqualify is denied as moot. IT IS SO ORDERED.

Footnotes

[1] The relevant facts previously were discussed in the court's November 30, 2006 Memorandum Opinion and Order. See Simons v. United States, Fed. Cl. , 2006 WL 3488862.

[2]Assuming, arguendo, that the court had jurisdiction over any claims alleged by Plaintiffs, RCFC 12(f) states that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." RCFC 12(f). RCFC 7 defines a

"pleading" as a complaint, an answer, and a reply to a counterclaim. See RCFC 7(a). Accordingly, neither a Response to a Motion, nor a Reply to a Response to a Motion, is a pleading for purposes of RCFC 12(f). Therefore, for these additional reasons, these motions are denied.

[3]RCFC 60(b) allows the court to relieve a party from an order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ... ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

RCFC 60(b).

United States Court of Federal Claims.
Danny C. SIMONS and Sally J. Simons,
Plaintiffs,
v.
The UNITED STATES, Defendant.
No. 06-115C.
Nov. 30, 2006.

MEMORANDUM OPINION AND ORDER

BRADEN, Judge.
I. RELEVANT FACTS[1]

This case involves a long-term dispute between Plaintiffs and the Internal Revenue Service ("IRS" or "Government") arising from two settlement agreements concerning tax returns filed by Plaintiffs in the 1970s and 1980s.

A. First Settlement Agreement.

On April 16, 1979, the IRS issued a Notice of Deficiency regarding Plaintiffs' 1974 income taxes. *See* Am. Compl. Ex. at 60. On July 13, 1979, Plaintiffs filed a Petition with the United States Tax Court ("Tax Court") contesting this deficiency. *See* Am. Compl. ¶ 40. In 1980, the IRS issued a second Notice of Deficiency for tax years 1972 and 1973. *Id.* ¶ 41. In response, Plaintiffs filed a second Petition with the Tax Court contesting this additional Notice of Deficiency. *Id.* ¶ 42. During the pendency of the Tax Court proceedings, the parties engaged in settlement negotiations. *See* Am. Compl. Ex. at 22-25 (Plaintiffs' January 11, 1982 Settlement Proposal). Ultimately, a settlement was reached ("First Settlement Agreement"). On April 22, 1983, the Tax Court entered decisions in both cases, "pursuant to the agreement of the parties," holding that for 1972, Plaintiffs owed no

additional taxes; for 1973, Plaintiffs owed $23,773 in additional taxes and a negligence penalty of $1,179; and for 1974, Plaintiffs owed $17,071 in additional taxes and a negligence penalty of $854. *See* Am. Compl. Ex. at 12-13 (April 22, 1983 Tax Court decision for tax years 1972 and 1973); Am. Compl. Ex. at 14-15 (April 22, 1983 Tax Court decision for tax year 1974).

On July 25, 1983, the IRS, acting pursuant to the Tax Court's April 22, 1983 Order, assessed Plaintiffs with a tax deficiency for tax year 1974. [FN2] *See Simons I*, 864 F.Supp. at 172. The Amended Complaint in this case alleges that on November 7, 1983, Plaintiffs sent a check to the IRS for $49,546.55 to satisfy 1973 and 1974 obligations, as required by the Tax Court's April 22, 1983 decisions. *See* Am. Compl. Ex. at 51 (photocopy of a check dated November 7, 1983, made out to the "Internal Revenue Service" by "Simons & Co." in the amount of $49,546.55); *see also Simons II*, 185 F.3d 875. The Amended Complaint in this case also alleges that the IRS credited the entire amount of that payment only against Plaintiffs' 1973 tax deficiency, leaving them liable for subsequent tax collection activities by the IRS for tax year 1974. *See* Am. Compl. ¶ 60.

In February of 1998, Plaintiffs filed motions in the Tax Court for leave to vacate the April 22, 1983 decisions for lack of jurisdiction. *See Simons II*, 185 F.3d 875. The Tax Court summarily denied both motions. *Id.* This decision was affirmed by the United States Court of Appeals for the Tenth Circuit. *Id.*

B. Second Settlement Agreement.

Sometime in 1988, the IRS resumed efforts to collect taxes allegedly owed by Plaintiffs for 1974. *See* Am. Compl. ¶ 69. On December 14, 1992, the United States Attorney filed a complaint against Plaintiffs in the United States District

Court for the District of Utah ("District Court") to collect the 1974 tax assessment, as well as tax deficiencies for 1982 and 1987. *See* Am. Compl. Ex. at 180-92 (Complaint, *United States v. Simons,* No. 92-1071 (D.Utah Dec. 14, 1992)); *Simons I*, 864 F.Supp. at 1721. The District Court encouraged the parties to engage in settlement negotiations. *See* Am. Compl. Ex. at 203- 04. Eventually, the parties agreed to settle the Government's claims in exchange for $55,000 ("Second Settlement Agreement"). *See Simons III*, 86 Fed.Appx. at 378. Plaintiffs, however, "reneged on the payment and instead moved to dismiss the action." *Id.* On June 18, 2002, the District Court held a hearing on Plaintiffs' Motion to Dismiss and the Government's Motion for Summary Judgment. *See* Am. Compl. Ex. at 203-04. On June 20, 2002, the District Court entered an Order ruling that the parties had entered into a valid and binding settlement, "pursuant to which [Plaintiffs] promised to pay $55,000 to the United States Treasury" and that Plaintiffs' "failure to honor the settlement agreement was not in good faith." *Id.; see also Simons III*, 86 Fed.Appx. at 378. The District Court also held that if the Plaintiffs did not comply with the terms of the Settlement Agreement, the Government's Motion for Summary Judgment would be granted. *See* Am. Compl. Ex. at 203-04. On June 24, 2002, Plaintiffs submitted a check to the Government for $55,000. *See* Am. Compl. Ex. at 214. On August 5, 2002, the District Court entered a Final Order and Judgment dismissing the case against the Plaintiffs in accordance with the Second Settlement Agreement. *See* Am. Compl. Ex. at 215-16; *see also Simons III*, 86 Fed.Appx. at 378.

Fifty-nine days after the entry of that Final Order, Plaintiffs appealed. Subsequently, the United States Court of Appeals for the Tenth Circuit affirmed, holding that by entering into a valid Settlement Agreement, Plaintiffs had "waived their right to appeal the matters they now attempt to raise." *See United States v. Simons,* 86 Fed.Appx. 377, 378 (10th Cir.2004). *Id.* On September 14, 2006, Plaintiffs filed a

Motion to Vacate the District Court's dismissal, which is still pending.

II. PROCEDURAL BACKGROUND

On February 15, 2006, Plaintiffs filed a Complaint in the United States Court of Federal Claims. On April 13, 2006, Plaintiffs filed an Amended Complaint alleging that the First Settlement Agreement was a binding contract that the Government breached in 1988 when it resumed efforts to collect deficient taxes from Plaintiffs in 1974. *See* Am. Compl. ¶¶ 22-92. The Amended Complaint also alleges that the Government's ongoing collection efforts, including the proceedings in the District Court, constituted: fraud, *id.* ¶¶ 93-120; an abuse of administrative process, *id.* ¶¶ 153-63; an abuse of judicial process, *id.* ¶¶ 164-75; slander and libel, *id.* ¶¶ 175-96; conspiracy, *id.* ¶¶ 197-210; and harassment, *id.* ¶¶ 211-13. The April 13, 2006 Amended Complaint further challenges the validity of the Second Settlement Agreement. *Id.* ¶¶ 121-49. Finally, the Amended Complaint alleges a wide range of takings claims. *Id.* ¶¶ 221-47.

On May 13, 2006, the Government filed a Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). On June 13, 2006, Plaintiffs filed a Response, captioned as a Motion to Strike the Government's Motion to Dismiss. On June 29, 2006, the Government filed a Corrected Motion to Dismiss, pursuant to RCFC 12(b)(1) and (b)(6). On June 30, 2006, the Government filed a Response to Plaintiffs' Motion to Strike. On July 14, 2006, Plaintiffs filed, by leave, a Response to the Government's Reply to Plaintiffs' Motion to Strike.

III. DISCUSSION

A. Jurisdiction.

The Tucker Act is the principal statute establishing the jurisdiction of the United States Court of Federal Claims. *See* 28 U.S.C. § 1491. Under the Tucker Act, the court has "jurisdiction to render judgment upon any claims against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan,* 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Therefore, in order to pursue a substantive right, a plaintiff must identify and plead a separate contractual relationship, constitutional provision, federal statute, and/or agency regulation that provides a substantive right to money damages for the court to have jurisdiction. *See Todd v. United States,* 386 F.3d 1091, 1094 (Fed.Cir.2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act."); *see also Roth v. United States,* 378 F.3d 1371, 1384 (Fed.Cir.2004) ("Because the Tucker Act itself does not provide a substantive cause of action, however, a plaintiff must find elsewhere a money-mandating source upon which to base a suit."); *Khan v. United States,* 201 F.3d 1375, 1378 (Fed.Cir.2000) ("[T]he plaintiff 'must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.' ") (quoting *James v. Caldera,* 159 F.3d 573, 580 (Fed.Cir.1998)). Therefore, a Plaintiff must state a source of substantive law upon which a claim may be asserted that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell,* 463 U.S. 206, 216, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); *see also Testan,* 424 U.S. at 400, 96 S.Ct. 948.

B. Standard For Decision.

1. Standard for Decision On Motion To Dismiss

Pursuant to RCFC 12(b)(1).

A challenge to the "court's general power to adjudicate in specific areas of substantive law ... is properly raised by a [Rule] 12(b)(1) motion." *Palmer v. United States,* 168 F.3d 1310, 1313 (Fed.Cir.1999); *see also Fisher v. United States,* 402 F.3d 1167, 1173 (Fed.Cir.2005) ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal--the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act."); RCFC 12(b)(1).
In deciding a motion to dismiss, the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995). Nevertheless, Plaintiffs bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed.Cir.1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question, it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction.").

2. Standard for Decision On Motion To Dismiss Pursuant to RCFC 12(b)(6).

Dismissal also is required when the plaintiff can prove no set of facts that would warrant the requested relief, when drawing all well-pleaded factual inferences in favor of the complainant. *See* RCFC 12(b)(6); *see also Levine v. United States,* 453 F.3d 1348, 1350-51 (Fed.Cir.2006). For purposes of evaluating the Government's motion, the court "assume[s]

all well-ple[ ]d factual allegations in the complaint to be true and draw[s] all reasonable inferences in [plaintiffs'] favor." *Leider v. U.S.*, 301 F.3d 1290, 1295 (Fed.Cir.2002).

C. The Court's Resolution Of The Government's Motion To Dismiss.

[1][2] Pursuant to the doctrine of *res judicata,* "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The purpose of *res judicata* is to ensure "that there should be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties." *Id.* at 401, 101 S.Ct. 2424 (quoting *Baldwin v. Traveling Men's Ass'n,* 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931)). *Res judicata* applies when "(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Ammex, Inc. v. United States.,* 334 F.3d 1052, 1055 (Fed.Cir.2003); *Jet, Inc. v. Sewage Aeration Sys.,* 223 F.3d 1360, 1362 (Fed.Cir.2000).

1. The Parties In This Case Are Identical To The Parties That Litigated The Prior District Court Case.

Plaintiffs have been involved in extensive litigation over the claims involved in this suit for more than twenty-five years in the United States Tax Court, the District Court, and the United States Court of Appeals for the Tenth Circuit. Plaintiffs in the instant case also were parties in the prior District Court action. *Compare* Am. Compl. ("Danny C.

Simons and Sally J. Simons, *Plaintiffs,* vs. United States ... *Defendant.") with* Complaint, *United States v. Simons,* No. 92-C-107A (D.Utah Dec. 14, 1992) at 1 ("*United States of America, Plaintiff v. Dan C. Simons, Sally C. Simons ...*").

2. The Prior Decision Was A Final Judgment On The Merits.

[3] For purposes of *res judicata,* courts have defined a "final judgment on the merits" to include stipulated dismissals, entered pursuant to a settlement agreement. *See Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 327, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (holding that a lawsuit, dismissed with prejudice pursuant to a settlement agreement "bars a later suit on the same cause of action"); *see also Harnett v. Billman,* 800 F.2d 1308, 1312 (4th Cir.1986) (holding that a case dismissed, with prejudice, pursuant to a settlement agreement is a "judgment on the merits" for *res judicata* purposes); *Brooks v. Barbour Energy Corp.,* 804 F.2d 1144, 1146 (10th Cir.1986) (holding that a dismissal with prejudice, upon an order of the court based on a settlement agreement, should be considered a judgment on the merits because it was entered pursuant to a settlement that resolved the substance of the disputed claims.); *Astron Indus. Assoc., Inc. v. Chrysler Motors Corp.,* 405 F.2d 958, 960 (5th Cir.1968) ("It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action."). Accordingly, the District Court's August 5, 2002, Final Order and Judgment was a final judgment on the merits for *res judicata* purposes.

3. Nearly All The Claims In The Amended Complaint Are Based On The Same Transactional Facts Previously Litigated In The District Court.

[4] In addition, nearly all of Plaintiffs' claims in this case arise from transactional facts previously litigated in the District Court. In determining whether the same cause of action is involved in two different lawsuits, the United States Court of Appeals for the Federal Circuit has adopted the transactional test of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) ("RESTATEMENT""). *See Young Eng'rs v. United States Int'l Trade Comm'n,* 721 F.2d 1305, 1314 (Fed.Cir.1983) ("[c]laim preclusion ... operates to bar subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief."); *see also Mars Inc. v. Nippon Conlux Kabushiki-Kaisha,* 58 F.3d 616, 619 (Fed.Cir.1995) ("It is well established that a party may not split a cause of action into separate grounds of recovery and raise the separate grounds in successive lawsuits; instead, a party must raise in a single lawsuit all the grounds of recovery arising from a single transaction or series of transactions that can be brought together.") (citing RESTATEMENT § 24(2)); *Foster v. Hallco Mfg. Co.,* 947 F.2d 469, 478-79 (Fed.Cir.1991) (" '[C]laim' within the meaning of *res judicata* principles [ ] [...] does not mean merely 'argument' or 'assertion.' 'Claim' is used in the sense of the facts giving rise to the suit." (citing RESTATEMENT § 24)). The United States Court of Appeals for the Second Circuit has further clarified that "A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second are present in the first." *Interoceanica Corp. v. Sound Pilots, Inc.,* 107 F.3d 86, 91 (2d Cir.1997) (quoting *SEC v. First Jersey Sec.,* Inc., 101 F.3d 1450, 1463-64 (2d Cir.1996)).

In the District Court action, the Government filed suit to enforce federal tax liens on certain parcels of real property owned by Plaintiffs to satisfy tax assessments for 1974, 1982, and 1987. In response, the Plaintiffs argued that the

Government breached the First Settlement Agreement and committed various torts in collecting these taxes. *See* Resp. to the IRS' Mot. Sum J., *United States v. Simons,* No. 92-C-1071B (D.Utah Jan. 29, 2001) at 10 (arguing that the IRS breached the April 22, 1983 settlement agreement); Mot. for Dir. Verdict, *United States v. Simons,* No. 92-C-1071B (D.Utah Feb. 16, 2001) at 3 (arguing that the IRS "coerced the taxpayers" into signing the settlement agreements and "committed fraud" by filing the District Court action). Plaintiffs also argued that the IRS engaged in "[d]enial of due process, [f]raud, [d]uress, [i]llegal liens, [m]isuse of judicial process[, and] malicious prosecution." *Id.* at 4.

4. Plaintiffs' Claims Are Barred By The Doctrine Of *Res Judicata.*

a. Plaintiffs' Claims Regarding Breach Of The First Settlement Agreement Are Barred.

In this case, Plaintiffs argue that the Government breached the First Settlement Agreement. *See* Am. Compl. ¶¶ 65-69 (alleging that the Government breached by violating the "duty of promissory estoppel"), ¶¶ 70-73 (alleging that the Government's attempts to collect taxes for 1974 violated the covenant of good faith and fair dealing); ¶ 74 (alleging that the Government's failure to keep proper records violated the covenant of good faith and fair dealing); ¶¶ 75-92 (alleging that the Government's interference with Plaintiffs' ability to procure certain tax records violated the covenant of good faith and fair dealing); ¶¶ 93-120 (alleging that Government committed fraud in the performance of the First Settlement Agreement). All of these claims arise from the Government's actions to collect the past due taxes that were the subject of the District Court case. Plaintiffs had ample opportunity to raise these breach of contract claims in that litigation. The facts essential to the litigation of these claims are the exact same as those required to assert the counterclaims for breach

of the same contract filed by Plaintiffs in the District Court case. Accordingly, they must be considered as arising from the same cause of action that was litigated in the District Court, and are therefore, barred by *res judicata.* [5] Regarding the "fraud in the performance" of the contract allegation, *see* Am. Compl. ¶¶ 93-120, plaintiffs appear not to appreciate that the United States Court of Federal Claims' jurisdiction does not extend to cases sounding in tort. *See* 28 U.S.C. § 1491(a) ("[t]he United States Court of Federal Claims shall have jurisdiction to render judgement upon any claim ... for liquidated or unliquidated damages *in cases not sounding in tort.*" (emphasis added)); *see also Brown v. United States,* 105 F.3d 621, 623 (Fed.Cir.1997) (holding that the United States Court of Federal Claims lacks jurisdiction over claims sounding in tort, including fraud). Jurisdiction to hear such claims is exclusively conferred on United States District Courts under the Federal Tort Claims Act. *See* 28 U.S.C. § 1346(b). The predecessor to the United States Court of Appeals for the Federal Circuit has held that this court may hear claims of alleged fraud and misrepresentation only to the extent that they are "closely bound up in the ... contractual relationship." *L'Enfant Plaza Prop., Inc. v. United States,* 227 Ct.Cl. 1, 645 F.2d 886, 892 (1981) (citing *Fountain v. United States,* 192 Ct.Cl. 495, 427 F.2d 759, 761 (1970)), *cert. denied,* 404 U.S. 839, 92 S.Ct. 131, 30 L.Ed.2d 73 (1971). The distinction is there must be a " 'tortious' breach of contract rather than a tort independent of the contract." *L'Enfant Plaza,* 645 F.2d at 892 (citing *Burtt v. United States,* 176 Ct.Cl. 310, 313-14 (1966)). In this case, Plaintiffs failed to link the alleged fraudulent conduct to a duty owed them under the First Settlement Agreement. Since this claim sounds in tort, not contract, this court does not have jurisdiction over Plaintiff's fraud claim.

b. Plaintiffs' Tort Claims Are Barred.

[6] Similarly, Plaintiffs also assert several other tort claims

against the Government. *See* Am. Compl. ¶¶ 153-63 (alleging abuse of administrative process); ¶¶ 164-75 (alleging abuse of judicial process); ¶¶ 175-96 (alleging ***716** slander and libel); ¶¶ 197-210 (alleging conspiracy); ¶¶ 211-13 (alleging harassment). Plaintiffs also asserted several tort claims against the Government in the District Court case. *See* Mot. for Dir. Verdict, *United States v. Simons,* No. 92-C-1071B (D.Utah Feb. 16, 2001) at 4 (arguing that the IRS engaged in "[d]enial of due process, [f]raud, [d]uress, [i]llegal liens, [m]isuse of judicial process[, and] malicious prosecution"). Again, the tort claims in this case arise from the Government's actions seeking to collect the past due taxes litigated in the District Court. The claims in this case arise from the same set of transactional facts as was litigated before the District Court. Accordingly, they must be considered as arising from the same cause of action that was litigated in the District Court and are barred by *res judicata.* [7] Furthermore, to the extent that the claims contained in ¶¶ 153-213 of the Amended Complaint, in part or in whole, sound in tort, the court does not have jurisdiction over such claims. *See* 28 U.S.C. § 1491(a) ("[t]he United States Court of Federal Claims shall have jurisdiction to render judgement upon any claim ... for liquidated or unliquidated damages *in cases not sounding in tort.*" (emphasis added)); *see also Brown v. United States,* 105 F.3d 621, 623 (Fed.Cir.1997) (holding that the United States Court of Federal Claims lacks jurisdiction over claims sounding in tort, including fraud). Jurisdiction to hear such claims is exclusively conferred on United States District Courts under the Federal Tort Claims Act. *See* 28 U.S.C. § 1346(b). The court, therefore, does not have jurisdiction over Plaintiffs' tort claims.

c. Plaintiffs' Challenge To The Validity Of The Second Settlement Agreement Is Barred.

[8] Plaintiffs also challenge the validity of the Second Settlement Agreement that led to the dismissal of the District

Court case. *See* Am. Com pl. ¶¶ 115-37. Plaintiffs, however, have already appealed the validity of this agreement and the United States Court of Appeals for the Tenth Circuit dismissed that appeal. *See Simons II*, 86 Fed.Appx. at 379 (affirming dismissal, pursuant to a binding settlement agreement). None of the facts alleged by Plaintiffs as grounds for challenging the validity of the Second Settlement Agreement occurred after the District Court entered a Final Order. As a result, these claims also arise from the same-transactional facts that were litigated before the District Court and the United States Court of Appeals for the Tenth Circuit. Accordingly, these claims are also barred by *res judicata.*

d. Plaintiffs' Taking Claims Are Barred.

[9] Finally, Plaintiffs raise a variety of takings claims against the Government. *See* Am. Compl. ¶¶ 207-40. Again, all of the facts alleged by Plaintiffs in support of these claims stem from the Government's tax collection activities that were the subject of the District Court litigation. Since the facts essential to these takings claims were present during the District Court litigation, all of these claims should have been properly raised during that case and are, therefore, barred by *res judicata.*

5. The United States Court Of Federal Claims Does Not Have Jurisdiction To Review The Final Judgments Of Other Federal Courts.

[10] Assuming *arguendo* that the doctrine of *res judicata* is not applicable to the claims enumerated above, nevertheless, the United States Court of Federal Claims does not have jurisdiction to review final judgments of the United States District Court for the District of Utah or final judgments of the United States Court of Appeals for the Tenth Circuit. *See* 28 U.S.C. § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court ... [b]y writ of certiorari[.]");

28 U.S.C. § 1291 ("The court of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]"); *see also Vereda, Ltda. v. United States,* 271 F.3d 1367, 1375 (Fed.Cir.2001) ("This means that the Court of Federal Claims cannot entertain a taking claim that requires the court to 'scrutinize the actions of another tribunal." (quoting **717 Allustiarte v. United States,* 256 F.3d 1349, 1352 (Fed.Cir.2001))); *Joshua v. United States,* 17 F.3d 378, 380 (Fed.Cir.1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts.").

6. Plaintiffs' Allegation that The Government Breached The Second Settlement Agreement Is Not Barred.

[11] The Amended Complaint, however, pleads one claim that appears to involve facts that occurred after the commencement of the District Court litigation. Plaintiffs argue that, if the court finds the Second Settlement Agreement to be valid, the Government breached this Settlement Agreement when it "billed the Plaintiffs for about an additional $4100" for taxes due from 1974. *See* Am. Compl. ¶¶ 128, 137, 139, 141. Plaintiffs do not appear to ask for any specific monetary damages for this alleged breach, instead, the Amended Complaint seeks "full expectation damages under any one claim, or all together, separately or jointly, in a total amount of no less than $45 million dollars [.]" Am. Compl. ¶ 254.

In order to recover damages for breach of contract, a plaintiff "must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of that contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation and Drainage Dist. v. United States,* 877 F.2d 957, 959 (Fed.Cir.1989). In this case, although Plaintiffs have alleged the existence of a valid contract between the parties, *i.e.* the Second Settlement

Agreement, it does not appear from the Amended Complaint that all elements of a breach of contract claim have been properly pled. In addition, the Government failed to address this specific claim in its Motion to Dismiss. Accordingly, to properly assess the validity of this claim, the court grants Plaintiffs leave to file a Second Amended Complaint that *succinctly* alleges each element in support of the alleged breach of the Second Settlement Agreement, including the amount of damages suffered as a result of this alleged breach. *See* RCFC 15(a) (authorizing the court to allow parties to amend pleadings "when justice so requires"); RCFC 8 ("A pleading ... shall contain (1) a *short and plain* statement of the claim showing that the pleader is entitled to relief[.]") (emphasis added).

IV. CONCLUSION

For the foregoing reasons, the Government's May 13, 2006 Motion to Dismiss is granted in part and denied in part. The Clerk of the Court will dismiss, with prejudice, all of Plaintiffs' April 13, 2006 Amended Complaint, with the exception of ¶¶ 128, 137, 139, 141, to the extent that those paragraphs state a claim for breach of the Second Settlement Agreement.

Plaintiffs are granted leave to file a Second Amended Complaint properly alleging all elements for breach of the Second Settlement Agreement, to be filed on or before Friday, December 15, 2006. Defendant will file any Motion to Dismiss Plaintiffs' Second Amended Complaint on or before Friday, January 12, 2007. Plaintiff will respond to Defendant's Motion on or before Friday, January 19, 2007. Defendant will file a reply on or before Friday, January 26, 2007.

IT IS SO ORDERED.

Footnotes

FN1. The relevant facts recited herein were derived from: the April 3, 2006 Amended Verified Complaint ("Am.Compl.") and exhibits thereto ("Am.Compl.Ex."). In addition, the dispute between Plaintiffs and the IRS has been the subject of on-going litigation in the United States Tax Court, the United States District Court for the District of Utah, and the United States Court of Appeals for the Tenth Circuit. See United States v. Simons, 864 F.Supp. 171, 172 (D.Utah 1994) ("Simons I"); Simons v. Commissioner of Internal Revenue, 185 F.3d 875 (10th Cir.1999) (Table) ("Simmons II"); United States v. Simons, 86 Fed.Appx. 377 (10th Cir.2004) ("Simons III"); see also United States v. Simons, 129 F.3d 1386 (10th Cir.1997) (reversing the district court's holding in Simons I). The court has cited the aforementioned cases where necessary to clarify the facts of this case.

FN2. The record does not evidence whether the IRS instituted a similar action for 1973.

6/20/2002
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION
UNITED STATES OF AMERICA

UNITED STATES PLAINTIFFS
DANNY AND SALLY J. SIMONS DEFENDANTS.

ORDER

This matter came before United States District Judge Dee V. Benson on June 18, 2002, pursuant to the United States' renewed Motion for Summary Judgment and defendants Simons" Motion to Dismiss for Lack of Subject Matter Jurisdiction. The United States was represented by Jeffrey D. Snow, Trial Attorney, U.S. Department of Justice and defendants Dan C. Simons and Sally I Simons were represented by Susan Rose, Esquire.

The Court, having considered the arguments and memoranda submitted in support of the motions, hereby finds and orders as follows:

This case was resolved by a valid and binding settlement agreement in 2001, a copy of which is attached as Exhibit A. The settlement effort was entered into at the suggestion of the Court and was voluntarily participated in by both sides There is no dispute that each party to this action agreed to the settlement agreement pursuant to which defendant Dan Simons promised to pay $55,000.00 to the United States Treasury within thirty days of the terms being accepted by the United States Department of Justice. The Court finds that there is no dispute that all necessary conditions have been satisfied to require the $55,000.00 payment. The Court also finds that the defendants' failure to honor the settlement agreement was not in good faith. Under these circumstances

the Court finds that the defendants must comply with their legal obligation under the settlement agreement, and orders that said payment be made to the United Sates Treasury on or before the close of business June 28, 2002. If such payment is not made by that time, the United States' renewed Motion for Summary Judgment will be granted. Defendants' Motion to Dismiss is DENIED. IT IS SO ORDERED

DATED this 19th of June, 2002,

HANDWRITTEN OFFER

1. Snow to recommend to his superiors a "worldwide" settlement (ALL claims in any way related to the matters in this case (Thurmond, Lusty, Lawson, etc.)) For a cash payment of $55,000, from & [*] on behalf of offeror, Dan C. Simons by cashier's check payment t- [*] to the Department of Treasury 30 days after notification of the offer's acceptance.
2. If the Department does not accept, Plaintiffs Motion for Summary Judgment will be reset for argument.
3. If Simons payment is not made, Plaintffs motion will be set reset for argument.
4. Upon payment [*] above, all IRS claims against the Simons (Dan & Sally & all the Defendatns named in this case # 2-92cv1071B will be forever discharged, released & extinguished – and any & all liens assessments etc (will be released if they have no already been released.

/s/ Dan C. Simons

/s/ Jeffery Snow /S/ S.R.S.

8/5/2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION
UNITED STATES OF AMERICA

UNITED STATES PLAINTIFFS
DANNY AND SALLY J. SIMONS DEFENDANTS.

FINAL ORDER AND JUDGMENT

NOW COMES THE COURT, to make findings of fact and conclusions of law, as follows: On June 20, 2002 this Court docketed n order requiring the taxpayer defendants to pay $55,000 to the Department of Treasury by June 28, 2002 or summary judgment for the United States would be entered.

The Taxpayer Defendants have provided proof to this Court that an OFFICIAL CHECK of U.S. BANK, sometimes referred to as a Cashier's check, made payable to the Department of Treasury, for an amount of $55,000 was delivered to the United States Department of Treasury, Salt Lake City office of Internal Revenue Service, on June 24, 2002, with an Internal Revenue Service stamped copy of the check delivered to and docketed in the Court's records on June 25, 2002. This payment by the Taxpayer defendants to the United States Department of Treasury constitutes complete satisfaction of this Court's June 20, 2002 order.

This Court defines the parties as follows;

For purposes of this FINAL ORDER AND JUDGMENT, the Court will define "Plaintiffs" as including the United States government, all of its former and current employees, including but not limited to, M.K. Mortensen, Kirk Lusty, Dal Lawsen, Don Thurman, in their official and personal capacities for any potential claims, issues, or allegation they

may bring against the "Defendants", associated in any manner whatsoever related to this case.

For purposes of this FINAL ORDER AND JUDGMENT, this Court will define "Defendants" as including Danny C. and Sally J. Simons, Harold Mark Simons, Jolene J. Simons Smith, First City Corp., "CHARLEMAGNE TRUST", "DOUGAN TRUST", and the "DAN. SIMONS EQUITY TRUST, a FAMILY ESTATE", and any other person or entity of any type, currently known and unknown, associated in any manner with the named defendants regarding issues, claims and/or allegations associated in any manner whatsoever with this docketed case.

This FINAL ORDER AND JUDGMENT hereby completely, now and forever, releases, dismisses, discharges, terminates, and extinguishes, with prejudice, ALL of the Plaintiffs', current and potential, foreseeable or unforeseeable, civil or criminal, known and unknown, claims, issues, allegations of any type whatsoever, in the Plaintiffs' personal or official capacities, s against all the Defendants, associated in any manner with this docketed case. The Plaintiffs will bear their own costs.

12/11/2006
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION
UNITED STATES OF AMERICA

UNITED STATES PLAINTIFFS
DANNY AND SALLY J. SIMONS DEFENDANTS.

Before the Court are: (1) Defendants' Motion For This Court To Vacate Its Judgment (Docket #157); (2) Defendants [sic] Renewed Rule 60 Motion (Docket #209); and (3) Defendant's [sic] Conditional Motion That a DUCivR 16 Settlement Conference Be Assigned To A Different District Court Or, Upon Agreement Of The Parties, To A Magistrate (Docket #194). Each of the above motions are DENIED. Defendants have failed to establish that they are entitled to relief under either Fed. R.Civ. P. 12(h)(3) or Fed. R.Civ. P.60(b). Therefore, Defendants' motion to vacate and renewed Rule 60 motion must be denied. Additionally, in the absence of relief pursuant to Defendants' motion to vacate, there is no basis for this Court to order a settlement conference. The Court adopts the reasoning set forth in the Government's responses to Defendants' motions as the legal grounds on which it bases this Order.

IT IS SO ORDERED.

DATED this 11th day of December, 2006.

Nos. 98-9012, 98-9013

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DANNY C. SIMONS; SALLY J. SIMONS, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

July 12, 1999, Filed

NOTICE: RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For DANNY C. SIMONS, SALLY J. SIMONS, Petitioners - Appellants: Susan R. Schildmeyer, The Tax Law Center, Sandy, UT.

For COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee: Stuart L. Brown, Chief Counsel, Washington, DC. Jonathan S. Cohen, Teresa E. McLaughlin, Randolph L. Hutter, United States Department of Justice, Washington, DC. Loretta C. Argrett, Asst. Attorney Gen., Washington, DC.

JUDGES: Before BALDOCK, BARRETT, and HENRY, Circuit Judges.

OPINION BY: ROBERT H. HENRY

OPINION: ORDER AND JUDGMENT *

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Petitioners Danny and Sally Simons (hereinafter "the taxpayers") have been embroiled in disputes with the IRS for many years. This particular part of their dispute began in 1979, when the IRS issued a notice of deficiency relating to taxpayers' 1974 income taxes. The taxpayers filed a petition for redetermination with the Tax Court on July 13, 1979, disputing the notice of deficiency (Tax Ct. No. 79-10312). In 1980, the IRS issued another notice of deficiency, this time relating to taxpayers' 1972 and 1973 income taxes. Again, the taxpayers filed a petition for redetermination in Tax Court disputing the notice of deficiency (Tax Ct. No. 80-13016). During the course of the Tax Court proceedings, the taxpayers' counsel negotiated with the IRS to settle the disputed taxes. The record before us does not contain a copy of the settlement agreement ultimately reached between the taxpayers and the IRS, but it does contain some correspondence from the taxpayers' counsel concerning proposed terms of the settlement. On April 22, 1983, the Tax Court entered decisions in both cases, each of which purported to be "pursuant to agreement of the parties." Tax Ct. Rec. No. 79-10312, Doc. 13 at 1; Tax Ct. Rec. No. 80-13016, Doc. 10 at 1. In No. 79-10312, the Tax Court found that the taxpayers owed additional taxes of $ 17,071 and a negligence penalty of $ 854 for tax year 1974. In No. 80-13016, the Tax Court found that the taxpayers owed no additional taxes or penalties for tax year 1972, but that they owed additional taxes of $ 23,573 and a negligence penalty of $ 1,179 for tax year 1973.

The taxpayers allege that they sent the IRS a check for what they believed to be the total obligation due under their settlement agreement with the IRS for tax years 1973 and 1974. They further allege that the IRS erroneously applied the entire payment toward their 1973 tax obligations, plus interest. The IRS has since commenced proceedings in federal district court to collect the allegedly unpaid 1974 tax obligation.

In February 1998, almost fifteen years after the Tax Court issued its two decisions, the taxpayers filed a motion in each case seeking leave to file out of time a motion to vacate. The accompanying motions to vacate alleged the Tax Court lacked jurisdiction to enter the April 1983 decisions. The Tax Court summarily denied both motions for leave to file out of time and, therefore, did not file either of the motions to vacate. The Tax Court did, however, lodge the motions to vacate so they are part of the Tax Court record. The taxpayers now appeal the Tax Court's denial of their motions for leave to file out of time.

A party seeking to vacate a Tax Court decision must file a motion within thirty days after entry of the decision, unless the Tax Court grants the party leave to file out of time. See Tax Ct. R. 162. "The Tax Court's denial of a motion for leave to file a motion to vacate is generally reviewed for an abuse of discretion." Harbold v. Commissioner, 51 F.3d 618, 621 (6th Cir. 1995). The facts here, however, raise an additional question of whether the Tax Court had jurisdiction to grant the motion. This issue is a question of law, which we review de novo. See id. A Tax Court decision becomes final ninety days after it is issued if no appeal is taken within that time. See id. "There is no statute that allows the Tax Court to reopen a final decision. Thus, once a decision of the Tax Court becomes final, the Tax Court no longer has jurisdiction to consider a motion to vacate its decision." Id. Some courts have recognized exceptions to this rule, however. One

exception is when the motion to vacate is grounded on the Tax Court's lack of jurisdiction over the proceedings, the rationale being that a decision entered in the absence of jurisdiction is not a decision at all and, therefore, never becomes final. See Billingsley v. Commissioner, 868 F.2d 1081, 1084-85 (9th Cir. 1989).

"The Tax Court is a court of limited jurisdiction and the determination of a deficiency and the issuance of a notice of deficiency are absolute preconditions to Tax Court jurisdiction." Alford v. Commissioner, 800 F.2d 987, 988 (10th Cir. 1986) (citations omitted). "In all cases, the jurisdiction of the [Tax] Court also depends on the timely filing of a petition." Tax Ct. R. 13(c). Accordingly, the taxpayers' motions to vacate focused primarily on the validity of the respective notices of deficiency and on he timeliness of the respective petitions for redetermination.

First, the taxpayers contended that the notices of deficiency were invalid because they were not posted to the IRS' master computer file. Second, the taxpayers argued that the petitions for redetermination were not timely filed. Third, the taxpayers argued that they filed the petitions under duress. Fourth, the taxpayers argued that the civil division of the IRS could not have examined the taxpayers' records before making the deficiency determination for 1973 because the criminal division had previously gathered all those records for use in a criminal prosecution of Danny Simon. Finally, the taxpayers argued that the Tax Court lacked jurisdiction to enter either decision once the taxpayers entered into a settlement agreement with the IRS.

On appeal, the taxpayers shift the focus of their arguments a bit. They generally concede that both petitions for redetermination were timely filed, and they do not pursue their argument that the IRS could not have examined the taxpayers' records before making the deficiency

determination for 1973. Therefore, we will deem these issues abandoned on appeal and will not consider them. See State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 984 n.7 (10th Cir. 1994). The taxpayers also raise a number of new arguments concerning the validity of the underlying settlement agreement with the IRS. The existence of an agreement between the IRS and a taxpayer as to the amount of deficiencies and additions to tax owed does not deprive the Tax Court of jurisdiction. See Webb v. Commissioner, 1994 Tax Ct. Memo LEXIS 557, 68 T.C.M. (CCH) 1106, 1113, 1994 T.C. Memo 549 (1994). Therefore, the taxpayers' arguments concerning the validity of the underlying agreement have no effect on the Tax Court's jurisdiction. As to the remaining arguments that were raised in the Tax Court and pursued on appeal, we conclude that none of them raises a legitimate challenge to the Tax Court's jurisdiction to enter the April 1983 decisions. In the absence of a legitimate challenge to its jurisdiction, the Tax Court's jurisdiction, the Tax Court did not abuse its discretion in denying the taxpayers' motions for leave to file a motion to vacate out of time.

The judgment of the Tax Court is AFFIRMED. The taxpayers' two motions for leave to supplement the record are DENIED, and the Commissioner's motion to strike those portions of the taxpayers' briefs referring to documents in the proposed supplemental record that were not before the Tax Court is GRANTED.

Entered for the Court

Robert H. Henry

Circuit Judge

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - -

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

No. 02-4201
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Counter-Defendant-Appellee,

v.

DAN C. SIMONS and SALLY J. SIMONS, individually and as trustees of the Dan C. Simons Equity Trust,
Defendants-Counter-Claimants-Appellants,

and JOLENE J. SMITH, as trustee of the Charlemagne Trust; FIRST CITY CORP.; HAROLD MARK SIMONS,
Defendants-Counter-Claimants.

January 22, 2004, Filed

NOTICE: RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Counter-Defendant - Appellee: Curtis C. Pett, United States Department of Justice, Tax Division, Washington, DC. Robert W. Metzler, United States Department of Justice, Tax Division, Washington, DC. Paul M. Warner, U.S. Attorney, Office of the United States Attorney, Salt Lake City, UT.

For DAN C. SIMONS, individually and as trustee of the Dan C. Simons Equity Trust, SALLY J. SIMONS, individually and as trustee of the Dan C. Simons Equity Trust,

Defendants-Counter-Claimants - Appellants: Susan Rose, Sandy, UT.

JUDGES: Before SEYMOUR, BRISCOE, and LUCERO, Circuit Judges.

OPINION BY: Mary Beck Briscoe

OPINION: ORDER AND JUDGMENT *

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendants appeal from a consent judgment dismissing the government's case against them pursuant to an executed and satisfied settlement. We hold that defendants waived their right to appeal the matters they now attempt to raise and affirm.

The government filed this action to reduce a tax assessment to judgment. The parties eventually agreed to settle all claims in exchange for $ 55,000. When defendants reneged on the payment and instead moved to dismiss the action, the district court held a hearing on the motion to dismiss as well as a pending motion for summary judgment from the government. At the hearing, the court informed defendants that it was ready to grant the government's summary judgment motion but, in the interest of closure, it afforded defendants one last opportunity to end the litigation by allowing them ten days to honor their obligation under the settlement agreement. Defendants paid the $ 55,000 and submitted an order dismissing the action. The court entered the order and closed the case. Fifty-nine days later, however, defendants filed this

appeal challenging the order they had drafted and the resultant judgment it entailed.

It is a well-accepted rule that a party to a consent judgment waives any objection to matters within the scope of the judgment. Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 526 (10th Cir. 1992) (collecting cases). If the party's appeal "represents no more than a retroactive attempt to undo consent properly given," summary affirmance is appropriate. Id. at 526 n.5 (quotation omitted). The rule does not apply, however, if "lack of actual consent, fraud in obtaining consent, lack of federal jurisdiction, or mistake are shown," *id.*, or if the party expressly reserved the right to appeal, id. at 527. The government argues persuasively for applying waiver here, noting the overlap between the substance of the appeal and the matters necessarily encompassed within the consent judgment, and also anticipating and refuting defendants' attempts to invoke exceptions to enforcement of he consent judgment.

The government contends, correctly, that defendants did not reserve a right to appeal in either the consent decree or the underlying settlement agreement. At certain points in their briefing defendants suggest the district court "promised" them that they would be able to appeal after they complied with the settlement agreement. Our reading of the court's comments leads us to the opposite conclusion. The obvious thrust of the court's comments is that defendants had come to a crossroad where they could put an end to the protracted litigation by complying with the settlement they had agreed to *or* suffer the entry of a far more costly summary judgment, *appeal that ruling*, and continue the legal process into the incalculable future:

Mr. Simons, I am disappointed in you. You can honor this agreement and pay maybe half of what they are going to assess *if I enter this order* [granting the government's motion

for summary judgment] ten days from now, *and then you can go ahead and appeal* that to the Tenth Circuit . . .

So I want to make it clear, I am enforcing the settlement agreement at the present time requiring the parties to comply with the $ 55,000 amount that was agreed to after a settlement was entered into following our last meeting. *If the defendant*, Mr. Simons, *continues to refuse to honor his binding agreement then* the alternative for this Court will be to *grant summary judgment* for the United States *and then the matter can continue in its legal process*.

Aplt. App. III at 411c (emphasis added). Defendants' reading misses the court's point, which is to contrast the closure to be achieved through compliance with the agreement and the interminable litigation to be expected from repudiation.

The government also convincingly explains why defendants would have no basis to claim lack of consent or mistake with respect to the parties' settlement agreement and the court's resulting judgment. The handwritten original draft of the agreement is fairly reflected in the consent judgment, which defendants themselves prepared for the court to sign.

Finally, the government notes that this action to reduce a tax assessment to judgment clearly falls within the broad grant of jurisdiction to the district courts over matters arising under the internal revenue laws. 28 U.S.C. §§ 1340 & 1345; 26 U.S.C. § 7402(a); *see* United States v. Anderson, 584 F.2d 369, 370 (10th Cir. 1978); United States v. Scherping, 187 F.3d 796, 798 (8th Cir. 1999). Defendants resist this point by asserting various objections to the government's case and characterizing these as jurisdictional deficiencies. Defendants do not, however, substantiate their jurisdictional arguments with relevant legal authority. Their most transparent argument in this respect is that, accepting their view on the merits, they owe no taxes, there is thus no lost revenue

involved, and, hence, the government lacks the legal injury necessary to have standing. This reasoning, which rests on the tacit premise that standing is not established unless and until the case is won on the merits, would effectively transform every action by the government to collect taxes into a jurisdictional dispute over standing. Defendants do not cite any authority supporting this facially implausible notion. Moreover, their invocation of res judicata and collateral estoppel to support their position on the merits does not introduce any jurisdictional element into the case; these are mere affirmative defenses. *See* Kenman Eng'g v. City of Union, 314 F.3d 468, 479 (10th Cir. 2002); Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313, 1317 (7th Cir. 1995).

Defendants also try to attribute jurisdictional status to their objection that the government's collection effort here fell outside the statute of limitations. The case law, however, treats the relevant limitations provision like most statutes of limitation, as just another affirmative defense subject to waiver. *See, e.g.*, United States v. McGee, 993 F.2d 184, 187 (9th Cir. 1993); United States v. Gurley, 415 F.2d 144, 147 (5th Cir. 1969). Indeed, we recognized that a statute of limitations defense may be defeated through private agreement by the parties--something that cannot be done with respect to jurisdictional deficiencies--in this very case on a prior appeal. *See* United States v. Simons, 129 F.3d 1386 (10th Cir. 1997). Defendants ignore this authority and, instead, cite a case holding that a statute of limitations relating to a suit *against* the *federal government* is jurisdictional. *See* Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990). But that case simply reflects the unique status of limitation provisions that qualify a waiver of sovereign immunity when the government is sued, which are imbued with the jurisdictional character of the underlying immunity itself. *See, e.g.*, Hoery v. United States, 324 F.3d 1220, 1221 (10th Cir. 2003); Dahn v. United States, 127 F.3d 1249, 1252 (10th Cir. 1997). Obviously this

principle has no application here.

It is readily apparent that the objections defendants now raise in an effort to escape the binding effect of the settlement agreement and resultant consent decree constitute the very substance of the case that they agreed to settle. These are precisely the "matters within the scope of the judgment" to which the settling party is deemed to have waived objection, rendering affirmance the appropriate disposition of the appeal.

Mock, 971 F.2d at 526 & n.5 (quotation omitted).

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

AFFIDAVIT OF HENRY VANTIENDEREN,CPA REGARDS TO TAX YEAR 1973-STIPULATED TAX COURT DECISION #13016-80 TAX YEAR 1974-STIPULATED TAX COURT DECISION #10312-79

County of Salt Lake
State of Utah

1. My name is Henry Van Tienderen.
2. My business address is 7001 S. 900 E. Suite 240, Midvale, UT 84047.
3. I am a Certified Public Accountant. I have been licensed as a Certified Public Accountant since 1982, and have had my own professional practice since 1986.
4. My CAF# with the Internal Revenue Service is 8005-22325R.
5. I have reviewed the "1 year and 1 Month Calculations" prepared by Counsel for Dan C. Simons. In connection with the calculations shown, I believe the following:
   A. The amount $6,503.82 is a reasonable computation of the 16% simple interest on a balance of $40,644.00 for a period of one year.
   B. The amount $360.80 is a reasonable computation of 11% compound interest using the factoring tables 17 and 41 from the Revenue Procedure 83-=7 on a balance of $490, 644.00 for a period of thirty days.
   C. The sum of $6503.82 and $365.80 is $6,869.62.
6. Dan C. Simons paid $49, 546.55 for tax years 1973 and 1974, of which $6,869.55 was interest. A calculation of $6,869.55 of interest is only $.07 different than the calculation of $6,869.62 of interest described above. In my opinion as a professional Certified Public Accountant, a difference of $.07 is a reasonable margin of error between a calculation of $6,869.55 and $6,869.62. The percentage differ4ence between these amounts is only .001% and could easily be the result of a rounding difference in the calculation.

7. Because the IRS calculation of interest is within .001% of interest calculated as described above, it is my professional opinion that it is within the realm of reason that the IRS used the same method to calculate the interest paid by Dan C. Simons.

Dated this 3rd day of February, 1998

/s/ Henry Van Tienderen

Subscribed and sworn to before me this 3 day of February, 1998. /s/ Wanda Alexander Notary public

My commission expires May 20, 1998.

CALCULATION

1973 taxes	23,573	penalties	1,179.00
1974 taxes	17, 071	penalties	854.00
Total	40644		2033.

Amount paid by Mr. Simons for both year 49, 546.55
Total of 1973 and 1974 taxes and penalties 42677.00
Leaving a total of interest of **6869.55**
Interest as of January 1, 1983 was 16% [simple]
Interest for April [month of decision] 1983 was 11%
1 year and 1 month (rounded as is allowed)
January 15, 1982 letter of offer
January 26, 1982 District Counsel Decision accepting offer
Or
February 1, 1983 date of IRS drafted 155 computations for Actual changes to the taxes.
Using eight place factoring tables of .00043715870 X 40644 =
17.77 per day X 366 [leap year] =**6503.82** 16% simple int. 1 yr.
11% compounded using tables 17 and 41 of rev. pr. 83-7 gives a facter of .009 rounded. . 009 X 40644 = **356.80** (rounded).
6503.82 + 365.80 = **6869.62** or $.07 difference from **6869.55**.

UNITED STATES TAX COURT

DANNY C. SIMONS and
SALLY J. SIMONS **Docket No. 13016-80**
Petitioners

V

COMMISSIONER OF INTERNAL REVENUE

DECISION

Pursuant to agreement of the parties in this case, it is ORDERED and DECIDED: That there are deficiencies in income taxes and additions to the tax due from the petitioners as follows:

	Deficiencies		
Taxable Year	Income tax	Additions to the Tax §6653(a)	§6653(b)
1972	None	---	None
1973	$23,573.00	$1,179.00	None

Judge /s/ Wm. M. Fay

Entered: Apr 22 1983

It is stipulated that the Court may enter the foregoing decision. Served Apr 22, 1983

It is further stipulated that, effective upon the entry of the decision by the Court, petitioners waive the restriction contained in I.R.C. §6213(a) prohibiting assessment and collection of the deficiency (plus statutory interest) until the decision of the Tax Court has become final.

KENNETH W. GIDEON Chief Counsel
Internal Revenue Service

/s/ HOWARD S. LANDA, BY: /s/RICHARD A. JONES
Counsel for petitioners District Counsel
KRUSE, LANDA, ZIMMERMAN P. O. Box 2520
& MAYCOCK Salt Lake City, Utah 84110
620 Kearns Building
Tel. No. (801) 524-5815
136 South Main Street
Salt Lake City, Utah 84101 Dated: 4/5/83
Dated: _____

UNITED STATES TAX COURT

DANNY C. SIMONS and
SALLY J. SIMONS **Docket No. 13016-80**
Petitioners

V

COMMISSIONER OF INTERNAL REVENUE

DECISION

Pursuant to agreement of the parties in this case, it is ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1974 in the amount of 417,071.00; and That there is an addition to the tax due from the petitioner for the taxable year 1974, under the provisions of I.R.C. §6653(a), in the amount of $854.00; and That there is no addition to the tax due from the petitioner for the taxable year 1974, under the provisions of §6653(b).

Judge /s/ Wm. M. Fay

Entered: Apr 22 1983

It is stipulated that the Court may enter the foregoing decision. Served Apr 22, 1983

It is further stipulated that, effective upon the entry of the decision by the Court, petitioners waive the restriction contained in I.R.C. §6213(a) prohibiting assessment and collection of the deficiency (plus statutory interest) until the decision of the Tax Court has become final.

KENNETH W. GIDEON Chief Counsel
Internal Revenue Service

/s/ HOWARD S. LANDA, BY: /s/RICHARD A. JONE
Counsel for petitioners District Counsel
KRUSE, LANDA, ZIMMERMAN P. O. Box 2520
& MAYCOCK Salt Lake City, Utah 84110
620 Kearns Building
Tel. No. (801) 524-5815
136 South Main Street
Salt Lake City, Utah 84101 Dated: 4/5/83
Dated: 4/5/83

Form 3610 Department of the Treasury-Internal Revenue Service symbols
(Rev. March 1972) AUDIT STATEMENT 2-1-83 SLC: RG: JS[*] DC

Name of Petitioner
Danny C. & Sally J. Simons

Kind of Tax
Income → 1972 & 1973-10316-80
1974-10312-79

Tax Year Ended	Tax	Deficiency Addition to Tax Negligence 6653(a)	fraud 6653(b)	overassessment
*12-31-72	$0	-0-		
12-31-73	23,573.00	1,179.00	-0-	
12-31-74	17,071.00	854.00	-0-	
Total	$40,644.00	2033.00	-0-	

* Statute expired no fraud penalty

☐ Interest for _____ will be computed under section _____ of the Internal Revenue Code.
(year)

☐ The deficiency shown above for _____ does not take into account a payment of _____ made on
(year)

_____
(date

54a

Form 5278 Department of the Treasury- Internal Revenue Service Return Form No. Schedule No.
Rev. May 1970 STATEMENT – INOME TAX CHANGES 1040 1

Name of Taxpayer(s)
D.C. & S.J. Simons

☐ Notice of Deficiency ☐ Other
[V] Settlement Computation
Tax years Ended

1. Adjustments to income

2. total adjustments from Sch. 2	<29,500>	<1647>
3, [V] Taxable income as shown [V] Notice of deficiency dated 4-15-80 & 4-16-79	90, 797	56, 856
4. [V] Taxable income as revised	61,297	55,209
5. Tax from [V] Tax Rate Schedules Y	22,987	19,761
6. Income Tax Sch. 3	NA	
7. Income Averaging Sch. 4		18,702
8. Corrected tax liability (lesser of lines f or 6, plus line 7)	22,987	18,702
9. less credits a. investment- per SN		1,721
10. Balance (line 8 less amounts on lines 9a-9c	22,987	16,981
11. Plus b. Self employment tax- per SN	864	1,043
12. Total corrected income tax liability (line 10 plus amounts on lines 11a-11c)	23,851	18,024
13. Total tax shown on return or as previously adjusted	278	953
14. increased or decreased in tax (difference between lines 12 and 13)	23,573	17, 071
15. Additions to the tax (listed below) Negligence, Sec. 6653(a)	1,179	854

Form 886-A (Rev. April 1960)

EXPLANATION OF ITEMS

Schedule no. 2

Name of Taxpayer
D.C. & Sally J. Simons

year/period ending

		1973	1974
(a) Commissions		<29.500>	
(b) Capital gain & loses			2,581
From payoffs allowed as a short term cap loss			
STCL	<25,1097>		
LTCG [*]	4,162		
Net <loss>	<21,947>		
Allowable 1974	<1000>		
Gan reported	1581		
Adjustments	2,581		
(c) Business expenses Math [*][*]			934
Net adj. To Sch. 1		<29,500>	<1,647>

56a

Schedule G (Form 1040) — INCOME AVERAGING — 1974

See Instructions on pages 3 and 4

Attach to form 1040 — SCH. 4

Name(s) as shown on Form 1040 — Your social security no.

D.C. & S.J. Simons

Taxable income and adjustments — Rev. Rul. 78-61[?]

Taxable Income	computation Year 1974	1st preceding base period Year 1973	2nd preceding base period year 1972	3d preceding base period year 1971
1. taxable income	55209	61297	50898	-0-
↓				
5. Adjusted taxable Income or base Period income	55,209	61297	50898	-0-
↓				
8 averagable income				21,550
↓				
19 total				18,722

57a

Request for Quick or prompt Assessment	quick assessment prepare in quadruplicate prompt assessment Prepare in triplicate	{*} ☐ Reciversh ip proceedings- ☐ Statutory period for assessment expires **07-19-83**	/s/ 6-23-83 page1 of 1

Taxpayer Identification Number [privileged soc. Sec. No.	23C Date /s/ **7-25-83**	Employee IDRS number	phone number of requester /s/ 3[*][*]-2833

Name and address of taxpayer Please Print or type Danny C. Simons & Sally J. Simons 9016 S. 1300 E. Sandy, Utah 84070 [handprinted]	Name and address of requester (please print or type) /s/ Wally Waluatn[*] /s/ CSB DN [*]1	
	Manager's Approval (Signature) /s/ Cathy Doret[*][*]	Date /s/ 6-23-83

[portions skipped
To the very bottom]

2859 (Rev. 3-82) Dispose of all prior issues

Department of Treasury- Internal Revenue

58a

KRUSE, LANDA, HANSEN & MAYCOCK
Attorneys At Law...
January 11, 1982

Ron Gardner, Esq.
Counsel's Office
Internal Revenue Service
[*] South 400 East
Salt Lake City, Utah 84111
RE: Danny C. and Sally Simons
Docket Nos. 10312-79 and 13016-80
Tax Years 1972, 1973 and 1974

Dear Mr. Gardner:

After our conversation of last week wherein you informed me that you have been recently assigned the above captioned cases, I decided to deliver to you this proposal of settlement in order that you may be informed as to the taxpayer's position. I hope this letter will be helpful in setting forth the parameters of our settlement discussions on January 13, and allow us to dispense with some of the preliminaries of the case.

As the file reflects, the government obtained an indictment against Mr. Simons for both 1972 and 1973 years under Section [*] of the Internal Revenue code. The file will also relfct the government lost and I believe that in all fairness to the taxpayer, this continued pursuit of him for fraud, albeit civil, I unwarranted.

Set forth below are proposals for each year, including the [*] of proposed adjustments taken from your statutory notices, the proposed amount of tax, and the proposed settlement. However, the settlement proposed is delivered as a package and not separable on a year by year basis.....

.....I am looking forward to meeting with you on January 13 concerning this settlement proposal. Respectfully yours, Kruse, Land, Hansen, Maycock /s/ Howard S. Landa

DISTRICT COUNSEL'S DECISION

SUBJECT: Danny C. & Sally J. Simons

Docket No. 10312-79 and 13016-80

The taxpayers named above were issued a statutory notice for the taxable years 1972 and 1973 and a second statutory notice for the taxable year 1974. The taxpayers have petitioned the Tax Court for a redetermination of the liabilities set forth on both of these statutory notices of deficiency. Though the cases have not been formally consolidated before the Tax Court, they do involve the same taxpayers and substantially the same issues, and will therefore be treated together for purposes of settlement. Two settlement documents will, however, be prepared for filing with the Court.

Mr. Danny C. Simons (petitioner) was indicted for alleged violations of I.R.C. § 7206 for his taxable years 1972 and 1973. He was brought to trial and was acquitted of all charges raised in the criminal case against him. That acquittal notwithstanding, and based on the available evidenc, the civil fraud penalty was recommended and asserted against the petitioner on his statutory notice for 1972, and 1973, and also in the statutory notice for 1974. The cases were sent to Appeals but no settlement was obtained primarily due to the existence of the fraud penalty. While we do not now attempt to second guess the Appeals Officer handling the case, we recommend conceding the fraud penalties for all three years. Upon receiving these cases in this office, the Special Agent handling the criminal case was contacted and consulted concerning the criminal case. After spending several hours with Special Agent Gerald Greenwood, he strongly recommended that the fraud penalties be dropped. Though he had once been an advocate of criminal charges against Mr. Simons, he now suggests that the Government would not be able to win even the fraud penalty in a civil action. After an examination of the files and discussions with the Special Agent, we concur with him. The reasons for this change is that the government's chief

witness unexpectedly and completely reversed her testimony from that which she had given during the investigation to the Special Agents. This witness, who was Mr. Simons' personal secretary and bookkeeper, cooperated with the Agents and with the attorney trying the criminal case. It was chiefly on her testimony together with evidence which she helped provide that the criminal case was raised against Mr. Simons. Without her testimony both to set forth the facts as the Government believes them to be and to authenticate crucial evidence the Government's criminal case and civil fraud cae are severely ham-strung. Further, there are various financing statements on which the Government heavily relied in the criminal case to prove the alleged criminal violations. These financing statements were held to be inadmissible by the Judge in the criminal case. It is likely that a similar ruling would prevent the admission of these documents in a civil fraud case as well, thus increasing the hazard of litigation even further. Therefore, the fraud penalties for all three years are being conceded.

The statute of limitations bars assessment of additional tax for the year 1972 absent a proof of fraud. In return for our concession of the fraud penalty for 1972, the taxpayer has conceded the non-deductibility of promissory notes in a subsequent year. Though the taxpayer would be able to prove that most of the $18,460.16 in promissory notes was not received in that year, he is conceding the non-deductibility of those notes for purposes of settlement. Had the respondent been able to prove fraud in 1972, we may have proven a deficiency in tax of approximately $11,000.00 We will now assess an additional amount of approximately $9,000.00 due to the petitioner's concession regarding the promissory notes.

The respondent is able to prove that in excess of 25% of the adjusted gross income for 1973 was omitted by the petitioner on his return for that year. Therefore, the petitioner consents to the opening of the statute of limitations based on that 25% omission. The respondent agrees to reduce the

dollar amount for commissions, received by the petition in 1973 by $29, 500.00. The petitioner hwas able to show in the criminal case that $21,500.00 of this amount allegedly received in 1973 was properly reported in subsequent years. It is highly unlikely that the government could now prove that this $21,500 should be included in the commission income for 1973. There is also an $8000 decrease agreed to by the Appeals officer in his supporting statement. In addition, the petitioner has consented to the negligence penalty under § 6653(a).

For the year 1974, the parties have agreed to the adjustments as set forth in the statutory notice of deficiency for that year with three exceptions:

1. Item 1c on the Income Tax Changers, form 5278, (loan payoffs) in the amount of $25, 108. 57 will be disallowed as a deduction, but the treatment of these loan payoffs as a short-term capital loss will be allowed.
2. The amount of the disallowed business expense on Item 1d of the Income Tax Changes, Form 5278, should be $18, 260.53, rather than $17, 326.64. The correct amount of the business expense appears on the Explanation of Items. Form 886-A, of the statutory notice of deficiency.
3. The petitioner consents to the negligence penalty under §6653(a).

While there may be indications that Mr. Simons committed fraud in the preparation of his 1972-1974 tax returns, the burden rests with the Government ot prove that fraud. That burden rests with the Government to prove that fraud. That burden cannot be overcome under the circumstances of this case. Through discussions with the Special Agent who conducted the criminal investigation and careful evaluation of the admissibility of evidence which would need to be relied on for the proof of fraud and considering the hazards of litigation that would result from an uncooperative witness, we now

feel that the foregoing represents a fair and equitable resolution of this case. The Appeals Office has reviewed this decision and agrees with the determinations and recommendations made herein.

/s/ Richard A Jones
District Counsel
Dated 1/26/83

EXPERT'S OPINION [abbreviated]

I, Bryan Bolander, am a Certified Public Accountant, "CPA", and have worked in my profession for 25 years. I am active in the Utah Association of Certified Public Accountants and have held the following positions; Continuing Professional Education Council chairman, Winter Conference Committee chairman, and recently began a two year term as the Treasurer of the executive board. I have practiced in the area of tax accounting for about 15 years, having been involved in individual employment, business, and other taxes, Tax Court negotiations and stipulated settlement situations. .....

.....Overall, without the original returns, there xan be no way in which anyone can piece together the elements of the puzzle of reconstructing the agreement that is the basis for the 1972, 1973 and 1974 decisions without making the erroneous assumptions that have been made in regards to 1974's account. These seven elements or puzzle pieces are (1) the deixions for 1974 and 1972, 1973 that are mathematically inseparably connected by the IRS drafted underling work documents, (2) the original 1974 returns, (3) the District Counsel's Decision stating the IRS agreed to treat for all three tax years together, though they would formally be entered as two stipulated Tax Court Decision documents, (4) letters from the Taxpayer's counsel to the IRS stating this was a package settlement, (5) the computer readouts of the 1973 and 1974 account showing full payment allegedly made for all three years was posted only in the 1973 account, and (6) the underlying work documents and (7) the cashiers check submitted for payment in November, 1983 show that a) all three years were treated together, b) that there was no provision for interest when there easily could have been if the IRS so wished to so state on IRS form 3610 (Defendants exhibit #4) wherein a blank space was provided and not filled in. It is my experience that revenue agents seldom fail to fill in a statement that equates to interest collection and that there were at least two individuals within the IRS examining the

work documents. None of the documents even so much as mentions interest as part of the settlement. The 1972 and 1973 and 1974 two stipulated decision for three years from an accounting view are inseparable mathematically and by intent. .....Conclusion

In my mind, as an accountant piecing together what happened in 1983, there was an agreement for all three years inseparable as a package, entered in two decision documents, that did not provide for specific interest or identify the specific statues by which interest would or even could be calculated. The 1974 tax year would be limited to a three year assessment statute due to the fact that the omission of gross income was less than 25%. A payment was made on November 7, 1983 that was credited to the only open tax year at the time, 1973, by IRS actions. The IRS stated the agreement was to treat all three years together. The IRS did not mention the word interest in any of the documents preceding the Tax Court decision. The IRS appears to have intended to omit any reference to interest from their documents and, thus, the IRS/Taxpayer's agreement. The IRS work documents demonstrate supervisory oversight and approval. In my opinion, the taxpayers fully paid their tax liability for all three years, no matter how the IRS credited the payment. Finally, the District Counsel's Decision shows the Internal Revenue Service spent several years in a futile effort to convict the taxpayers for civil and criminal tax fraud without adequate evidence to prove their claims. Since these IRS actions prolonged the period for assessment, the IRS may have felt justified in not referencing any accrued interest or in collecting a very small amount of interest for the debts attributable to tax years 1972, 1973 and 1974 for which the taxpayers made full payment. I Bryan Bolander, CPA, hereby state, under penalty of perjury, that the foregoing is true to the best of my information and belief, and was prepared by me upon analysis of the aforementioned documents. So signed, this 28th day of May, 2002. /s/ Bryan Bolander

civil no. 92c1071

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA
Plaintiff,

v.

DAN C. SIMONS, SALLY J. SIMONS,
JOLENE J. SIMITH as trustee of the
CHARLEMAGNE TRUST, FIRST CITY CORP
And HAROLD MARK SIMONS, DAN C. SIMONS
And SLLY J. SIMONS, as trustees of the DAN C.
SIMONS EQUITY TRUST

The United States of America, by counsel, for its complaint against the above-named defendants alleges as follows:

1. This is a civil action to reduce federal income tax assessments against Dan C. Simons and Sally J. Simons to judgment, ...
2. This action is brought at the direction of the Attorney General of the United States and at the request and with the authorization of the Chief Counsel of the Internal Revenue Service, ...
3. The Court has jurisdiction over this action pursuant to Section 7401 of the Internal Revenue Code of 1986 and Sections 1340 and 1345 of Title 28, United States Code.

9. On July 25, 1983; March 18, 1985; ..... August 20, 1990;... November 5, 1990; April 15, 1991 and September 9, 1991 a delegate of the Secretary of Treasury mad assessments against Dan C. Simons and

Sally J. Simons for unpaid taxes, plus interest, penalties, and fees for .... Tax period 1974.

10. Despite timely notice and demand for payment of the assessments.... Defendants Dan C. Simons and Sally J. Simons remain indebted to the United States in the amount of $118,576.27, as of May 31, 1992, together with subsequent additions according to law.

[approximately $19,000 dollars of the $118,576.27 amount was for 1983 and 1987, one year dismissed, and the other settled, when the DC stated in 2002 that the $55,000 paid was about half of what was owed, the amount owed was far greater by 2002 with compounded interest daily, if the initial 7-25-83 assessment was valid].